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No. OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1999

GARY E. CALKINS AND ANNA ROSA CALKINS
D/B/A INDIO GROCERY OUTLET,
Petitioners,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in failing to consider a recent California Court of Appeal opinion, *Trader Joe's v. Progressive Campaigns, Inc.*, 73 Cal.App.4th 425 (1999), when ascertaining relevant California law relating to access to private property for expressive activity in holding that California law allowed access by non-employees to picket and handbill on the private property of a free-standing grocery store or in not certifying the issue to the California Supreme Court for their determination of the issue;

2. Whether the Ninth Circuit erred in affirming the NLRB's decision allowing non-employees to picket and handbill on the private property of a free-standing grocery store in derogation of the property rights protected by the Fifth and Fourteenth Amendments of the Constitution, given that this Court, in *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 96-97, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), approved as constitutional under the United States Constitution only a narrow right of public access to shopping center property.

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I.

Gary E. Calkins and Anna Rose Calkins d/b/a Indio Grocery Outlet respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTORY STATEMENT

This petition seeks review of the decision of the Court of Appeal for the Ninth Circuit, which affirmed a decision of the National Labor Relations Board ("the Board")[1] allowing handbilling and picketing by non-employees on the private property of a free-standing grocery store located in Indio, California and operated by Petitioners Gary E. Calkins and Anna Rosa Calkins d/b/a Indio Grocery Outlet ("Petitioners"). Although the Board and the Ninth Circuit correctly applied this Court's holding in *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992), in determining that California trespass law controlled the issue of whether the non-employee union members could gain access to the property, the Board and the Ninth Circuit wrongly applied California law in contravention of Petitioners' private property rights. In doing so, the Ninth Circuit disregarded established California precedent by failing to consider a recent California Court of Appeal ruling, *Trader Joe's v. Progressive Campaigns, Inc.*, 73 Cal.App.4th 425 (1999), issued after briefing and oral argument were complete, which held that California's access rights for petition signature gathering do not extend to a free-standing grocery store. *Id.* at 433. Despite Petitioners'

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[1] The United Food and Commercial Workers Union, Local 1167, and the United Food and Commercial Workers International Union, AFL-CIO-CLC, were the Charging Parties in proceedings before the Board, but did not participate in the proceedings before the United States Court of Appeals for the Ninth Circuit.

calling the Ninth Circuit's attention to the case by way of a Petition For Rehearing, the Ninth Circuit denied the Petition without comment.

The *Trader Joe's* decision (which also concerned access rights to a freestanding grocery store) was the factually closest decision to the situation presented to the Ninth Circuit in the instant case, and, therefore, the Ninth Circuit should have considered it in its decision or granted the petition for rehearing. Considerations of comity militate strongly in favor of review of the Ninth Circuit's disregard of the analytical framework expressed in *Trader Joe's*. If the Ninth Circuit had doubts about how the California Supreme Court would rule after review of the *Trader Joe's* decision, it should have certified the issue to the California Supreme Court pursuant to Rule 29.5 of the California Rules of Court.[2]

This case also presents the question of whether the Ninth Circuit's misapplication of California law resulted in a compensable taking of Petitioners' property rights, because the Ninth Circuit's decision applying California law falls outside the narrow exception to this Court's takings jurisprudence recognized in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). In *PruneYard*, this Court held that the Fifth and Fourteenth Amendments to the United States Constitution were not violated by the California Supreme Court's decision in *Robins v. PruneYard Shopping Center*, 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 P.2d 341 (1979). In *Robins*, the California Supreme Court construed the California Constitution as allowing a right of access for free speech purposes to the common areas of a large shopping mall, covering 21 acres

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[2] *See, e.g., Los Angeles Alliance for Survival v. City of Los Angeles*, 157 F.3d 1162 (9th Cir. 1998) (issue of whether Los Angeles ordinance violated the liberty of speech clause of the California Constitution certified to the California Supreme Court).

and containing more than 65 specialty shops, 10 restaurants, and a movie theater. *Id.* at 902, 910.

In finding that the California Supreme Court's ruling in *Robins* did not violate the United States Constitution, this Court created a very narrow exception to its jurisprudence regarding the takings clause and private property rights, based on the broad nature of the shopping center owner's invitation to the public and the quasi-public nature of a large shopping center. The majority opinion in *PruneYard* noted that the shopping center in question was open to the public at large, and held that use of the common areas, subject to reasonable time, place and manner restrictions, was not constitutionally infirm. 447 U.S. at 82-83. A concurring opinion by Justices Powell and White stated that they concurred with most of the opinion and the judgment "on the understanding that our decision is limited *to the type of shopping center involved in this case.* Significantly different questions would be presented if a State authorized *strangers to picket or distribute leaflets in privately owned, freestanding stores and commercial premises." Id.* at 96 (emphasis added). Because the Ninth Circuit *did* authorize strangers to picket and distribute leaflets in a privately owned, freestanding store, in contravention of the limited exception established in *PruneYard*, this holding violates petitioners constitutional rights.

II.

OPINION BELOW

The order denying the petition for reconsideration is attached to the Appendix filed with this Petition as Exhibit A. The opinion of the Court of Appeals for the Ninth Circuit is attached to the Appendix filed with this Petition as Exhibit B. The underlying decision of the Board is attached to the Appendix filed with this Petition as Exhibit C.

III.

JURISDICTION

The opinion of the Ninth Circuit below was filed on August 11, 1999 (*N.L.R.B. v. Calkins* 187 F.3d 1080 (9th Cir. 1999)). The petition for reconsideration of the opinion was timely filed pursuant to Federal Rules of Appellate Procedure 26(a)(1) and 40(a)(1) on September 27, 1999, and was denied without a written opinion on November 16, 1999. Mandate issued November 30, 1999. Pursuant to Supreme Court Rule 13, this Petition is timely as it is filed within 90 days of the denial of the reconsideration. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Board had jurisdiction pursuant to Sections 2(2), 2(5), 2(6) and 2(7) of the National Labor Relations Act ("NLRA"), and its opinion in this matter is reported at 323 NLRB 1138, 155 L.R.R.M. (BNA) 1210, 1997 WL 397549 (N.L.R.B.). The Ninth Circuit had jurisdiction pursuant to 29 U.S.C. § 160(e).

IV.

CONSTITUTIONAL PROVISIONS INVOLVED

This appeal implicates the provisions of the Fifth and Fourteenth Amendments to the United States Constitution.

U.S. CONST, amend. V, provides in pertinent part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. CONST, amend. XIV, provides in pertinent part:

"Sect. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

* * *

Sect. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

V.

PROCEDURAL HISTORY

United Food and Commercial Workers Union, Local 1167 and United Food and Commercial Workers International Union, AFL-CIO-CLC filed charges with the Board against the Petitioners on December 15, 1994 and April 5, 1995. After consolidation of the cases and the filing of an amended complaint by the Board and an answer by the Petitioners, the parties waived a hearing before an administrative law judge and moved to transfer the proceeding to the Board for decision. The parties submitted a Stipulation of Facts to the Board, which issued its Decision and Order on June 30, 1997. The Board determined that Petitioners violated the NLRA because Petitioners' exclusion of the union members from its property in violation of California law constituted an unfair labor practice. The Board found that California law allowed the union members access to the Petitioners' property for the expressive activity in which they were engaged. The Board petitioned for enforcement of its Order finding that Petitioners violated the NLRA. Petitioners and the Board submitted briefs, and the Ninth Circuit heard oral argument. On July 8, 1999, after briefs were submitted and oral argument was heard in this case, the California Court of Appeal held that stand-alone grocery

stores, such as the one run by the Petitioners, have the right under California law to exclude persons wishing to engage in expressive activity (*e.g.*, gathering signatures for petitions) on their private property. *Trader Joe's, supra.* The *Trader Joe's* decision was immediately published in the Los Angeles Daily Journal at 1999 Daily Journal D.A.R. 6967 and appeared in West's California Reporter in the advance sheet issue dated July 23, 1999.

On August 11, 1999, the Ninth Circuit issued its decision in this case, holding that Petitioners violated the NLRA because: (1) the union representatives' activity was protected by the NLRA and (2) Petitioners did not possess a state law property right to exclude the union representatives' activity, and, therefore, their exclusion was an unfair labor practice. In reaching the conclusion that Petitioners did not have a state law property right to exclude the union representatives, the Ninth Circuit panel ignored *Trader Joe's,* even though it purports to analyze the very same issue of California law. On September 27, 1999, Petitioners therefore filed a Petition For Rehearing by the panel in light of *Trader Joe's.* The Petition was summarily denied on November 16, 1999.

VI.

REASONS FOR GRANTING THE PETITION

The Petition should be granted because the Ninth Circuit failed to consider a factually similar California Court of Appeal case, *Trader Joe's, supra,* issued after briefing and oral argument, but before the Ninth Circuit's decision was filed. *Trader Joe's* was brought to the attention of the Ninth Circuit on a timely basis through a Petition For Rehearing, which was summarily denied. In failing to consider a recent decision of an intermediate California appellate court, the Ninth Circuit violated this Court's holding in *Stoner v. New York Life Ins. Co.,* 311 U.S. 464, 61 S.Ct. 336 (1940),

which requires a federal court ascertaining relevant state law to follow the decisions of intermediate courts of that state "in the absence of convincing evidence that the highest court of the state would decide differently." *Id.* The Ninth Circuit also ignored its own similar precedents on the issue. *See, e.g., Lewis v. Telephone Employees Credit Union,* 87 F.3d 1537, 1546 (9th Cir. 1996) (federal court must rely on intermediate state courts absent convincing evidence highest court would decide differently). In holding that California law allowed access for expressive activity at a free-standing grocery store, despite recent, clear law to the contrary, the Ninth Circuit ignored considerations of comity and federalism that are essential to the balance of power in our Constitutional system. *See, e.g., Younger v. Harris,* 401 U.S. 37, 44, 91 S.Ct. 746, 750 (1971). In Younger, this Court emphasized the importance of comity in the relationship between the state courts and federal courts. Comity is the "proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."

Contrary to the Ninth Circuit's ruling, as discussed in detail below, *no other published appellate court decision, in California or in any other state, has applied Robins to any type of property other than a shopping center.* In fact, *Trader Joe's,* the most recent California appellate decision to interpret *Robins,* specifically held that stand-alone grocery stores have the right to prohibit expressive activity on their property.

The decision of the Ninth Circuit, approving the right of access for speech activity on private property leased to the Petitioners for operation of a free-standing grocery store, exceeds the extremely narrow boundaries set by this Court

in reviewing California's infringement of the property owner and occupier's rights under the Fifth and Fourteenth Amendments, discussed in this Court's *PruneYard* decision, so as to effect a taking of the property rights at stake. This Court's jurisprudence on the takings clause has identified two different types of takings. A compensable taking occurs: (1) where the state authorizes the physical occupation of private property and requires acquiescence in the occupation by the holder of the right to exclude (*F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 252, 107 S.Ct. 1107, 1112, 94 L.Ed.2d 282 (1987)) or (2) where a regulation of the use of property " 'forces some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' " (*PruneYard, supra,* at 83, 100 S.Ct. at 2041 (quoting *Armstrong v. United States,* 364 U.S. 40, 48, 80 S.Ct. 1563, 1568, 4 L.Ed.2d 1554 (1980)).

A review of both of these lines of cases leads to the conclusion that a taking has occurred based on the Ninth Circuit's opinion expanding the narrow *PruneYard* decision and sharply curtailing the rights of the owner of a free-standing grocery store.

VII.

ARGUMENT

A. THE NINTH CIRCUIT MISAPPLIED THE REQUIRED STANDARD IN ASCERTAINING CALIFORNIA LAW RELATING TO ACCESS FOR EXPRESSIVE PURPOSES, BY IGNORING A RECENTLY DECIDED CALIFORNIA COURT OF APPEAL DECISION ON POINT, AND THUS REACHED AN ERRONEOUS CONCLUSION AS TO STATE LAW ON THE ISSUE.

1. *Standards Employed By Federal Courts For Ascertaining State Law.*

In *Stoner, supra,* this Court held that a federal court predicting state law in a diversity case was required to follow the decisions of intermediate courts of that state "in the absence of convincing evidence that the highest court of the state would decide differently." *Id.* (emphasis added). Prior Ninth Circuit cases have held that, in the absence of a clear decision as to the issue by the highest court, the federal court must predict how the highest state court would decide the issue, using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance. *Arizona Electric Power Cooperative, Inc. v. Berkeley,* 59 F.3d 988, 991 (9th Cir. 1995); *In re Kirkland,* 915 F.2d 1236, 1239 (9th Cir. 1990). A federal court's prediction of state law is reviewed *de novo. Kirkland, supra,* at 1238.

2. *The Ninth Circuit Was Required To Follow Trader Joe's Because There Is No Evidence That The California Supreme Court Would Have Decided Differently.*

The California Court of Appeal issued the *Trader Joe's* decision after the parties submitted briefs and the Court heard oral argument in this case. The *Trader Joe's* decision specifically addresses the question of law presented in this

case: whether California law prohibits stand-alone grocery stores from excluding speech activity. Since the *Trader Joe's* decision is consistent with the U.S. Supreme Court's *Pruneyard* decision, as well as every published state appellate court decision which addresses expressive activity on private property, this Court is required to follow it.

a. *Under California Law, As Articulated In Trader Joe's, Petitioners Were Not Required To Permit Expressive Activity On Their Property Because Stand-Alone Grocery Stores Are Not Quasi-Public Forums.*

Under California law, there is a limited right to engage in expressive activity on private property that has been transformed into a public meeting place. As correctly explained by the Ninth Circuit below, in *Robins,* the California Supreme Court held that "sections 2 and 3 of article I of the California Constitution protect free speech and petitioning, reasonably exercised, in *shopping centers* even when the centers are privately owned." *Calkins, supra,* at 1090 (citing *Robins,* 23 Cal.3d at 910 (emphasis added)). The Ninth Circuit also recognized that whether *Robins* applies to a particular property depends upon the nature and extent of the public invitation to the property and the nature, purposes and primary uses of the property. *Id.*

The *Trader Joe's* decision explained that "[*Robins*] instructs us to balance the competing interests of the property owner and of society with respect to the particular property or type of property at issue to determine whether there is a state constitutional right to engage in the challenged activity." *Trader Joe's,* 73 Cal.App.4th at 433. The court further explained that:

> The [*Robins*] court's conclusion that the societal interest in using shopping centers as forums for expressive activity outweighed the property interest of the shopping center

> owner was supported by tangible evidence that shopping centers were supplanting central business districts as the preferred public forum, i.e., the place where people chose to come and meet and talk and spend time.

Id. at 433-34. Thus, *Robins* only applies to private property that has been transformed into a quasi-public forum.

The *Trader Joe's* court then applied the balancing test articulated in the *Robins* decision and analyzed (1) the property owner's interests, including the physical characteristics of the property and the extent of the invitation to the public to use the property and (2) society's interest in using the property for expressive activity. The property in *Trader Joe's* was an approximately 11,000 square-foot, stand-alone retail store in Santa Rosa, California that was not part of a shopping center and was not shared with any other retailer. The store had one entrance and a parking lot for the exclusive use of its customers and employees. *Id.* at 428. Unlike the shopping center that was the subject of the *Robins* decision, the Trader Joe's store contained no plazas, walkways or central courtyard where patrons could congregate. *Id.* at 433. The court emphasized that the store invited people to its property for a single purpose: shopping. *Id.*

The *Trader Joe's* Court then explained that:

> because the store is a stand-alone structure, there can be no contention that its relationship to other establishments transforms it into a public forum. In short, the Santa Rosa Trader Joe's is not a public meeting place and the society has no special interest in using it as such.

Id. The *Trader Joe's* court supported this conclusion by explaining that, unlike the case with the shopping center in *Robins* and the cases that have applied it, there is no tangible evidence that stand-alone grocery stores are supplanting central business districts as public forums where people congregate. *Id.* at 434. Thus, after applying the

Robins balancing test, the *Trader Joe's* court found that "in contrast to the shopping center discussed in [*Robins*], the Santa Rosa Trader Joe's is not a public forum uniquely suitable as a place to exercise free speech and petitioning rights." *Id.* Based upon *Trader Joe's,* it must follow that *Robins* does not apply to stand-alone grocery stores.

Similarly, if the balancing test articulated in the *Robins* and *Trader Joe's* decisions is applied to facts here, it becomes clear that Petitioners' grocery store is not a quasi-public forum for expressive activity and, therefore, the handbillers could be excluded. The parties stipulated that Petitioners' family-owned, stand-alone retail grocery store occupies a 20,500 square-foot building, with a parking lot for the use of Petitioners' customers and employees, and a walkway that runs along the front of the store. Signs prohibiting "trespassers, solicitors, or distribution of literature by nonemployees" are posted at each of Petitioners' two entrances. Significantly, the parties stipulated, as in *Trader Joe's,* that persons other than the employees and customers are excluded from the store's premises. As a stand-alone store, Petitioners' grocery store also does not have any relationships with other establishments that would transform it into a public forum. *Id.* at 433. Thus, as in *Trader Joe's,* Petitioners' stand-alone grocery store does not have *any* qualities of a public meeting place; and it is not required to permit expressive activity pursuant to *Robins.* As set forth below, the Washington Supreme Court, Oregon Court of Appeals and several California trial courts have found that stand-alone stores that are several times the size of the Petitioners' grocery store do not constitute quasi-public forums.

Thus, consistent with the *Trader Joe's* decision, Petitioners had a state law property right to exclude the union handbillers and, therefore, they did not violate the NLRA. Since *Trader Joe's* is directly on point, this Petition should

be granted to correct the erroneous decision of the Ninth Circuit.

b. *The Trader Joe's Decision is Consistent With Robins And Its Progeny Because No Appellate Decision Has Ever Applied Robins To Any Type Of Property Other Than Large Shopping Centers.*

The *Trader Joe's* decision is the *only* California authority that analyzes whether *Robins* applies to activity at stand-alone grocery stores[3] and is entirely consistent with this Court's decision affirming *Robins,* and its progeny, none of which has applied *Robins* to any type of property other than a shopping center.

i. *This Court Approved A Very Narrow Right Of Access To Private Property.*

When it affirmed *Robins,* this Court approved a very narrow state-created right of access to private property. Justice Powell, with whom Justice White joined, "concurring in part and in the judgment," wrote:

> Significantly different questions would be presented if a state authorized strangers to picket or distribute leaflets in privately owned freestanding stores and commercial premises. . . . As the Court observes, state power to regulate private property is limited to the adoption of reasonable restrictions that "do not amount to a taking without

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[3] The Ninth Circuit in *Calkins* notes on pages 1090-92 and in footnote 5 that in *Bank of Stockton v. Church of Soldiers of the Cross of Christ of the State of California,* 44 Cal.App.4th 1623, 1629-30, 52 Cal.Rptr. 2d 429 (1996), the California Court of Appeal opined that "a large supermarket-type grocery store" would not fall within the "modest retail establishment" exception. However, in that case, the court analyzed whether *Robins* should be extended to a stand-alone bank, *not* a grocery store. Thus, the *Bank of Stockton* court's statement is mere dictum, and it has little or no precedential value. *See, e.g., Phaneuf v. Republic of Indonesia,* 106 F.3d 302, 305 (9th Cir. 1997).

just compensation or contravene any other federal constitutional provision."

PruneYard Shopping Center v. Robins, 447 U.S. 74, 96-97.

ii. *No Published Appellate Decision Extended Robins To Any Property Other Than Shopping Centers.*

Given this narrow approval of the state-created right of access, for the 20 years between the *Robins* and *Trader Joe's* decisions, it is not surprising that no state appellate court has published a decision applying *Robins* to any property other than a shopping center. Every California court decision finding properties to be within the scope of *Robins* has involved a shopping center. *See, e.g., Union of Needletrades v. Superior Court,* 56 Cal.App.4th 996, 65 Cal.Rptr. 2d 838 (1997); *H-CHH Assocs. v. Citizens for Representative Gov't.*, 193 Cal.App.3d 1193, 238 Cal.Rptr. 841 (1987).[4]

In those states outside California that have adopted expressive activity standards similar to *Robins,* the courts have also specifically declined to extend those standards to stand-alone retail stores. For example, the New Jersey Supreme Court has explained that "regional shopping centers are, in all significant respects, the functional equivalent of a downtown business district . . . ." but that a single retail store, *even if large in size,* does not have sufficiently public

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[4] No other California case analyzing *Robins* has held that Robins requires stand-alone retail stores to permit expressive activity, and all have declined to extend *Robins* to properties other than shopping centers. *See Bank of Stockton, supra, Feminist Women's Health Center v. Blythe,* 32 Cal.App.4th 1641, 39 Cal.Rptr. 2d 189 (1995) (two-story medical office building); *Allred v. Harris,* 14 Cal.App.4th 1386, 18 Cal.Rptr. 2d 530 (1993) (medical center with 19 tenants); *Planned Parenthood v. Wilson,* 234 Cal.App.3d 1662, 286 Cal.Rptr. 426 (1991) (medical office building with six tenants); *Allred v. Shawley,* 232 Cal.App.3d 1489, 284 Cal.Rptr. 140 (1991) (medical office building).

character to warrant infringing upon the property rights of the owner by requiring the owners of such stores to permit handbilling. *New Jersey Coalition Against War in the Middle East v. J.M.B Realty Corp.*, 650 A.2d 757, 780-81 (N.J. 1994). In Oregon, the Court of Appeals, the highest state court to consider the issue, held that two 103,909 square-foot free-standing HomeBase retail stores did not constitute public forums. *Wabban, Inc. v. Brookhart,* 921 P.2d 409 (Or. App. 1996). In Washington, the Supreme Court recently held that three 80,000 square-foot grocery stores were not open to expressive activity under an analysis strikingly similar to *Trader Joe's. Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wash.2d 623, 989 P.2d 524, 531 (1999). Other state courts, in adopting speech standards similar to *Robins,* specifically limited those standards to large shopping centers. *See Batchelder v. Allied Stores Inter., Inc.*, 445 N.E.2d 590, 595 (Mass. 1983) ("Shopping malls, a recent and growing form of retail merchandising, function in many parts of this State much as the 'downtown' area of a municipality did in earlier years."); *Alderwood Assocs. v. Washington Environmental Council,* 635 P.2d 108, 117 (Wash. 1981) (regional shopping center "performs a traditional public function by providing the functional equivalent of a town center or community business block"). Moreover, California trial courts have held that free-standing retail stores are not required to permit expressive activity on their property.[5]

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[5] On March 17, 1999, the Los Angeles Superior Court in *Busch v. Ralphs,* Case No. SC 051874, ruled that Ralphs' 32,428 square-foot Venice, California store was not the functional equivalent of a municipality or traditional town square and its frontage "area does not qualify as a quasi-public forum under *PruneYard.*" (April 9, 1999 Order Granting Defendant Ralphs Grocery Company's Motion for Summary Judgment, pp. 2-3.) On May 11, 1999, in *Young v. Raley's,* Yolo County Superior Court Case No. V97-000076, the Court concluded that a 57,688 square-foot supermarket is "not a quasi-public forum and is not

Since the *Trader Joe's* decision is the only California case to consider whether the limited rights created by *Robins* extend to stand-alone grocery stores, such as Petitioners', and is consistent with the decisions of all other courts that have decided the issue, this Court should follow it and grant this Petition.

iii. The Ninth Circuit Erred In Holding That *In re Lane* Extended *Robins*, As *Lane* Was Decided Ten Years Before *Robins*.

The opinion below is erroneous in relying on *In re Lane*, 71 Cal.2d 872, 79 Cal.Rptr. 729, 457 P.2d 561 (1969) for the proposition that California had extended the *Robins* right of access for expressive activity to a free-standing grocery store. The California Supreme Court decided *Lane* in 1969, ten years before it issued the *Robins* decision. The Ninth Circuit confused the chronology in citing *Lane* in support of the statement that "*since* [*Robins*], the California courts have recognized that speech is protected not only in 'shopping malls' but also on the privately-owned sidewalk of a stand-alone grocery store." *Calkins*, *supra* at 1090 (emphasis added). The *Lane* decision is the only case that the Ninth Circuit cites for this proposition. However, since the *Lane* decision *precedes Robins*, it cannot logically extend it. In fact, the only reference to *Lane* in *Robins* was for the general proposition that California had independently recognized a right of "liberty of speech" independent of the federal right. *Robins*, *supra*, at 908.

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required to make its property available to persons seeking to exercise unrelated free speech and petition activities on its premises." (Statement of Decision at p. 2.) On September 15, 1999, in *Waremart v. Discovery Petition Management Co.*, the Butte County Superior Court, in granting Waremart's motion for summary judgment excluding signature gatherers from the front of a warehouse-type grocery store, held that the *Trader Joe's* analysis applied to the 79,324 square-foot Waremart store in Chico, California.

Based upon an erroneous analysis of the precedential value of *Lane*, the Ninth Circuit incorrectly states that "California law prohibits owners of shopping malls and *general access supermarket stores* from excluding speech activity on their private adjacent sidewalks and parking lots."[6] *Calkins*, 187 F.3d at 1090 (emphasis added). However, as set forth below, no case, in California or any other state, has applied the public access requirements set forth in the *Robins* decision to a stand-alone grocery store. In fact, the *Trader Joe's* decision specifically held that stand-alone grocery stores are *not* required to permit speech on their property.

B. THE NINTH CIRCUIT ERRED BECAUSE ITS DECISION REQUIRING THE PETITIONERS TO ALLOW ACCESS FOR EXPRESSIVE ACTIVITY IN A FREE-STANDING GROCERY STORE CONSTITUTES A TAKING OF THEIR PROPERTY RIGHTS WITHOUT JUST COMPENSATION, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court's takings analysis is divided into two distinct types of takings: (1) takings that authorize "physical occupation" of private property and (2) regulatory takings. *Yee v. City of Escondido*, 503 U.S. 521, 522-23, 112 S.Ct.

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[6]The Ninth Circuit's rejection of Petitioners' position on Lane was based upon its conclusion, set forth in footnote 5 of the Ninth Circuit opinion (187 F.3d at 1090-91, fn. 5), that the California Constitution is a source of protection for speech in other public settings is inaccurate because, as shown in *Trader Joe's*, no California case has extended protection to speech on private property beyond shopping centers.

1522, 1526, 118 L.Ed.2d 153 (1992). Takings that authorize physical occupation of property, or actually take title to property, must generally be compensated. *Id.* at 522. Takings that are alleged to result from regulation of use of property only require compensation where "considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden which should be borne by the public as a whole." *Id.* at 523.

1. *The Ninth Circuit's Decision Allowing Picketers To Physically Occupy Petitioners' Property Constituted A Per Se Taking.*

A compensable taking occurs where the state authorizes the physical occupation of private property and requires acquiescence in the occupation by the holder of the property rights. *Florida Power Corp., supra.* In this case, the use of Petitioners' property by protesters creates a situation where persons occupying (even temporarily) Petitioners' property are "interlopers with a government license." *Florida Power, supra,* at 252-53, 107 S.Ct. at 1112. Unlike *Pruneyard,* where the shopping center contains benches and other common areas where the public may congregate, and therefore extends an invitation to the general public, no such places exist on the Petitioners' property, and no such invitation is extended by them.

In *PruneYard,* the Court established a very limited exception to takings analysis. That exception does not apply here. *PruneYard* held that a shopping center's extension of an invitation to the general public prevented it from recovering for a "taking" despite the authorization of use of the common areas of the shopping center by the California Supreme Court in *Robins.* The nature of the limited exception is best expressed in the concurring opinions of Justices Powell and White in that case. They stated that they

concurred with most of the opinion and the judgment "on the understanding that our decision is limited *to the type of shopping center involved in this case.* Significantly different questions would be presented if a State authorized *strangers to picket or distribute leaflets in privately owned, freestanding stores and commercial premises.*" *Id.* at 96 (emphasis added). This concurring opinion further emphasized that the decision did not "apply to all 'shopping centers.' This generic term may include retail establishments which vary widely in size, location and other relevant characteristics." *Idem.*

The factually dependent narrow exception is distinguishable from the instant case because the extremely limited invitation to the public issued by Petitioners is not sufficient to allow occupation for expressive activity without effecting a taking. Although *PruneYard* rejected a takings argument advanced by the shopping center owner, holding that the physical occupation of the property by the persons seeking to conduct expressive activity was not determinative, the Court reached that decision because the shopping center held itself open to the general public, and the expressive activity was limited to common areas. This Court has previously recognized that the invitation to the public issued by a free-standing store is limited to customers of that store. "Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there." *Lloyd Corporation, Ltd. v. Tanner,* 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972).

In *Nollan v. California Coastal Commission,* 483 U.S. 825, 831 fn. 1, 107 S.Ct. 3141, 3146 fn. 1, 97 L.Ed.2d 677 (1987), this Court distinguished between *PruneYard* and the case before it, in which this Court held that the California Coastal Commission could not compel a property owner to dedicate public access to a privately-owned beach

without effecting a taking. This Court emphasized that the shopping center property at issue there had been opened to the general public. *Idem.*

In *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), the Court held that exactions which meet *Nollan's* nexus test must also meet a "rough proportionality" test in terms of their magnitude. In contrasting *Dolan* and *PruneYard,* the *Dolan* Court stated that in *PruneYard* "a major private shopping center that attracted more than 25,000 daily patrons had to provide access to persons exercising their state constitutional rights to distribute pamphlets and ask passers by to sign their petitions. *Id.* at 85, 100 S.Ct., at 2042. We based our decision, in part, on the fact that the shopping center 'may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions.' *Id.*, at 83, 100 S.Ct., at 2042." *Dolan, supra,* at 394, 114 S.Ct. at 2321 (quoting *PruneYard*). The *Dolan* court then stated, in finding a constitutional violation, that allowing the City to obtain an easement for persons to use a "Greenway" along Dolan's property would cause her to "lose all rights to regulate the time in which the public entered onto the Greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated." *Id.* at 394, 114 S.Ct. at 2321. The Ninth Circuit's decision virtually eviscerates Petitioners' rights to exclude persons wishing to conduct expressive activity. If the State of California wishes, as a matter of public policy, to have the Petitioners open their private property for expressive activity, they may condemn such property for that use, *but must then pay for it. See Nollan, supra,* at 841-42, 107 S.Ct. at 3151 ("California is free to advance its 'comprehensive program' if it wishes, by using its power of eminent domain . . . but if it wants an easement across the *Nollan's* property, it must pay for it."). As the Ninth Circuit

decision now stands, it effects a taking of the Petitioners' property rights.

2. *If The Ninth Circuit's Decision Does Not Constitute A Per Se Taking, It Constitutes A Regulatory Taking Which Must Be Compensated Nonetheless.*

Although this Court has applied a less strict standard when evaluating regulatory takings, an application of that analysis to the fact pattern here leads to the conclusion that a taking has occurred. The regulations (or in this case the decision of the Ninth Circuit) are evaluated by the Court as an "essentially ad hoc, factual inquir[y]." *Kaiser Aetna v. United States,* 444 U.S. 164, 175, 100 S.Ct. 383, 390 (1979). In conducting this inquiry, the Court has traditionally looked at the proportionality of the interests being advanced with the level of interference with property rights presented. *See City of Monterey v. Del Monte Dunes,* ____ U.S. ____, 119 S.Ct. 1624, 1635 (1999). In other words, this Court has conducted a balancing test, similar to that enunciated by the California Supreme Court in *Robins,* and applied by the California Court of Appeal in *Trader Joe's.*

The Ninth Circuit's decision does not strike the proper balance in this case. The boundaries of the proper balance were discussed in Justice Powell's concurring opinion in *PruneYard,* which approved a minor dilution of the rights of owners to exclude certain persons due to the expansive invitation made to the general public by the Pruneyard Shopping Center. Because the property at issue in the case at bar, a free-standing grocery store, lacks most of the public attributes found in a shopping center, it is not a forum for free expression which California law should protect stringently. Further, because the property at issue in this case is not fully open to the public, as the shopping center was in *Robins,* the Petitioners' rights to exclude are stronger than the property owners in *Robins.* In addition, in *Robins,* the Court noted that there were common areas in which the

expressive activity can occur, without interfering with the entrances to various stores, or flow of pedestrian traffic. The proper constitutional balance from the perspective of the Fifth and Fourteenth Amendments is the balance struck by the California Court of Appeal in *Trader Joe's,* following the test enunciated in *Robins.* Both the *Robins* test and the test for regulatory takings are fact-specific inquiries involving a balancing of competing factors. Because of the constitutional restrictions inherent in the balance, cases applying *Robins* and its progeny in California and elsewhere have limited *Robins* and its progeny to shopping centers, as discussed in detail above.

VIII.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: February 14, 2000

Respectfully submitted,

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APPENDIX A
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
GARY E. CALKINS; ANNA ROSA CALKINS, d/b/a INDIO GROCERY OUTLET,
Respondent.

No. 97-71240
NLRB Nos. 21-CA-30424 and 21-CA-30614

ORDER

Before: BRUNETTI and WARDLAW, Circuit Judges, and SEDWICK, District Judge.[1]

The petition for rehearing is denied.

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[1]Hon. John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
GARY E. CALKINS; ANNA ROSA CALKINS,
d/b/a INDIO GROCERY OUTLET,
Respondents.

No. 97-71240
NLRB Nos. 21-CA-30424 and 21-CA-30614

OPINION

Application for Enforcement of an Order of
the National Labor Relations Board

Argued and Submitted May 3, 1999
Pasadena, California

Filed August 11, 1999

Before: BRUNETTI and WARDLAW, Circuit Judges and SEDWICK, District Judge.[1]

Opinion by Judge Kim McLane Wardlaw

WARDLAW, Circuit Judge:

This case requires us to further refine the principles that govern the relationship between the rights of employees

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[1] Hon. John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

under Section 7 of the National Labor Relations Act (the "NLRA" or the "Act") and the state law property rights of employers. We do so in the fairly unique context of California's limitation of those property rights in favor of rights of expression. *See Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980) (hereinafter *"Pruneyard"*). The precise question before us is whether Respondent violated Section 8(a)(1) of the NLRA by threatening to have, and having, nonemployee Union representatives arrested for engaging in protected informational handbilling and picketing in furtherance of a consumer boycott, on a privately owned walkway and parking lot fronting Respondent's grocery store. The National Labor Relations Board (the "NLRB" or the "Board") determined that Respondent does not have a property right under California law to exclude individuals from the store's walkway and parking lot, and therefore, the Respondent's actions constituted an unfair labor practice. The Board now petitions for enforcement of its Order finding that Respondent committed an unfair labor practice in violation of the Act. We have jurisdiction pursuant to 29 U.S.C. § 160(e), and we grant enforcement.

BACKGROUND

The parties have stipulated to the determinative facts. Gary E. Calkins and Anna Rosa Calkins are the sole proprietors and operators of the Indio Grocery Outlet, a supermarket located in Indio, California ("Respondent"). Respondent operates the store pursuant to a "Store Operator Agreement" with Canned Foods, Inc. ("CFI"). CFI leases the real property and the building from its owner, Read Properties. The Store Operator Agreement and an amendment thereto give Respondent the right to operate the Indio store.

Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The

United Food and Commercial Workers, Local 1167, United Food and Commercial Workers International Union, AFL-CIO-CLC (the "Union"), is a labor organization within the meaning of Section 2(5) of the Act.

The Indio store is a free-standing building open to the general public, with a parking lot on the west and south sides of the building for use by customers and employees of the Indio store. The parking lot has two entrances and is surrounded on three sides by a public sidewalk with an approximately 140 by 62 foot grass lot located on the east side of the parking lot separating a portion of the parking lot from the public sidewalk. The Indio store has two entrances which can be accessed only through the parking lot. A walkway runs along the front of the store. The Indio store is not part of a shopping mall. Across the public sidewalk, the property is bordered on three sides by public streets, and on one side by California Highway 111.

Respondent avers that on each entrance to the Indio store a sign is posted which states, "Trespassers, solicitors or distribution of literature by non-employees is prohibited on this property" and that Respondent posted the signs when it began operating the Indio store in March 1994. Respondent further avers that Union official Frank Mott was made aware of the policy in September 1994, before the start of the picketing and handbilling campaign. Persons other than customers and employees of the store are excluded from the premises.

The Indio store employees are not represented by the Union or by any union. Eleven picketers representing the Union first came onto Respondent's parking lot on September 30, 1994. When asked to leave the parking lot, the picketers relocated to the public sidewalk.

On December 13, 1994, Union representatives again engaged in peaceful picketing and handbilling in the Indio

store parking lot and on the walkway in front of its entrance, as well as on the public sidewalk. One picketer was stationed by each door to the Indio store, several walked around the parking lot in front of the store, and the rest remained on the public sidewalk. The picketers, approximately nine in total, distributed leaflets to Respondent's customers and employees that read, in English and Spanish: "Don't Shop Canned Foods Grocery Outlet Indio. SUPPORT YOUR UNION NEIGHBORS! UFCW Local 1167" and listed the names and addresses of four Union supermarkets in the Indio area. The picketers also carried signs that read, in English and Spanish, "Please Do Not Shop Grocery Outlet. UFCW Local 1167."

Gary Calkins requested that the picketers leave the parking lot and walkway in front of the store. The picketers refused. Approximately 10 to 15 minutes later, Calkins and three Indio store employees stood at the entrance to the store and distributed handbills of their own to customers entering the store. Respondent's handbills read: "WE ARE NOT ON STRIKE!! Thank you for shopping at Indio Grocery Outlet."[2]

Calkins summoned the Indio Police Department to the property and requested that the police remove the picketers

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[2] In smaller type, Respondent's handbills also included the following text:

Dear Valued Customer:

Thank you for your patronage! We want to be sure you know that none of the people outside picketing are Indio Grocery Outlet employees. We are all happily employed and are receiving competitive wages and benefits from our employer. This is a family owned and operated store and we are all inside the store ready to serve you as always. Come back and see us again soon, and PLEASE BRING YOUR FRIENDS. The Employees of the Indio Grocery Outlet.

The handbill was signed by thirteen Indio store employees.

from the walkway and parking lot in front of the store. The police declined to arrest or interfere with the picketers. Calkins informed the picketers that if they did not leave, he would request that the police make a citizens' arrest. The picketers relocated to the public sidewalk. Calkins advised the picketers that if they returned to the store premises, he would request the Indio police to arrest them. Later the same day, after the picketing had ended, the Union was informed by the Indio Police Department that Calkins had requested that the police make a citizens' arrest of picketers who came on his property. The Union then decided to file a charge with the NLRB, which it did two days later, and not to return to the property until after its resolution.

On March 29, 1995, the Union representatives nevertheless returned to engage in peaceful picketing and handbilling on store premises. Again, Calkins asked them to leave. One of the picketers, Joe Duffle, advised Calkins that the picketers had a right to be on his property because the Board had issued a complaint. Calkins again summoned the police and requested that they make a citizen's arrest. They did, after unsuccessfully requesting that the picketers voluntarily leave the property. Duffle was cited by the Indio Police Department for trespassing, but the case was later dropped.

As of July 1995, approximately seven to nine picketers remained on the public sidewalk surrounding the parking lot adjacent to Highway 111. The picketers distributed leaflets to the general public and to customers and employees at the parking lot entrance.

ADMINISTRATIVE PROCEEDINGS

The Union filed two unfair labor practice charges against Respondent. The first, filed on December 15, 1994, contended that Respondent violated Section 8(a)(1) of the Act in September and December 1994, by having Union representatives threatened with arrest if they picketed and hand-

billed on Respondent's property. The second, filed on April 5, 1995, contended that Respondent violated Section 8(a)(1) of the Act by having Duffle arrested on March 29, 1995.

On March 20, 1995, the Board issued a complaint and notice of hearing. An amended complaint issued on April 25, 1995, consolidating the two charges. The parties waived a hearing before an administrative law judge and moved to transfer the proceeding to the Board for decision. The motion was granted, and the parties submitted a Stipulation of Facts to the Board. The Board rendered its decision on June 30, 1997. *See Calkins d/b/a Indio Grocery Outlet,* 323 N.L.R.B. 1138, 323 N.L.R.B. No. 196, 1997 WL 397549.

STANDARD OF REVIEW

The National Labor Relations Board "has the primary responsibility for developing and applying national labor policy," and its rules are accorded "considerable deference." *NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775, 786 (1990) (citations omitted). The Board's interpretation of the NLRA is accorded deference as long as it is "rational and consistent" with the statute. *See NLRB v. United Food and Commercial Workers Union, Local 23,* 484 U.S. 112, 123 (1987) (citations omitted); *NVE Constructors, Inc. v. NLRB,* 934 F.2d 1084, 1086 (9th Cir. 1991). Decisions of the NLRB will be upheld on appeal if its findings of fact are supported by substantial evidence and if the agency correctly applied the law. *See Retlaw Broadcasting Co. v. NLRB,* 172 F.3d 660, 664 (9th Cir. 1999); *NLRB v. Iron Workers of Cal.,* 124 F.3d 1094, 1098 (9th Cir. 1997).

DISCUSSION

I

To determine whether to grant enforcement of the Board's Order, a close review of its findings and conclusions is essential. First, the Board found that the Union agents' picketing and handbilling constituted conduct protected by the NLRA. *See Calkins,* 1997 WL 397549, at n.12 (1997). Specifically, the Board found that the Union's activity was "clearly protected under the second proviso to Sec. 8(b)(7)(C), which concerns picketing or other publicity for the purpose of truthfully advising the public that an employer does not employ members of, or have a contract with, a labor organization."[3] *See id.*

Second, the Board found that Respondent lacked a property interest that entitled it to exclude individuals from its property. *See id.* at *6-7. The Board stated that "in cases in which the exercise of Section 7 rights by nonemployee Union representatives is assertedly in conflict with a respondent's private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the Union representatives, an interest which entitled it to exclude individuals from the property." *Id.* at *6 (quoting *Food for Less,* 318 NLRB 646, 649 (1995), *affd.*

[3] Section 8(b)(7) provides in relevant part: "It shall be an unfair labor practice for a labor organization or its agents . . . to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative. . . ." 29 U.S.C. § 158(b)(7). Section 8(b)(7)(C) provides that nothing in the subsection "shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of a labor organization." 29 U.S.C. § 158(b)(7)(C).

in relevant part, 153 LRRM 2291 (8th Cir. 1996)). The Board noted that "[u]nder California [property] law, neither a shopping center nor its individual tenants have a right to prohibit individuals from handbilling or picketing on [] shopping center premises, even though the shopping center is privately owned. *Id.* (citing *Bristol Farms, Inc.*, 311 N.L.R.B. 437, 439(1993)). It further noted that this holding has been extended to the sidewalk outside a retail store that is not part of a shopping center. *See id.* at *6 (citing *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 25 Cal.3d 317, 158 Cal.Rptr. 370 (1979) (in bank), *cert. denied*, 447 U.S. 935 (1980); *In re Lane*, 71 Cal.2d 872 (1969) (in bank)). The Board concluded that Respondent did not have the right to exclude the Union agents from handbilling on the walkway or parking lot, and that as a result, its interference with such conduct violated Section 8(a)(1) of the Act. *See id.*

Finally, the Board concluded that *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), does not control the outcome of this case. *See id.* In *Lechmere*, the Supreme Court held that a shopping center owner "may validly post his property against nonemployee distribution of union literature," except where union representatives lack reasonable access to employees outside an employer's property, 502 U.S. at 538. Though the Board did not articulate why *Lechmere* did not apply, we infer from the Order that its reasoning is that *Lechmere* applies only when the property owner is entitled, under state law, to exclude individuals engaged in protected Section 7 activity or free speech activity generally.

The Order requires Respondent to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. *See id.* at *8. The Order also requires Respondent to post copies of a remedial

notice, reflecting the Board's findings and guaranteeing that it will not have Union representatives arrested for picketing and distributing Union literature on Respondent's property, and that it will not interfere with, restrain, or coerce its employees in the exercise of their Section 7 rights. *See id.*

Respondent argues that the Board's reliance on state property law constitutes an analytical error that impermissibly overrides federal labor law. Relying on *Lechmere,* Respondent contends that the Union representatives did not have a right protected under Section 7 to conduct their consumer boycott activities on Respondent's property, and that consequently, its actions did not violate Section 8(a)(1). We must therefore review the Board's resolution of the asserted conflict between state property law and federal labor law.

II

Section 8(a)(1) of the NLRA provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 of the Act, 29 U.S.C. § 157]." 29 U.S.C. § 158(a)(1). The core activity protected by Section 7 is the right of employees to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157. "By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers." *Lechmere,* 502 U.S. at 532.

However, "insofar as the employees' 'right of self-organization depends in some measure on [their] ability . . . to learn the advantages of self-organization from others,' "

nonemployees[4] have a "derivative right" to engage in organizational activities under Section 7. *See id.* (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 111-12 (1956)). Protected Section 7 conduct has traditionally consisted of the right to engage in organizing campaigns, *see, e.g., Lechmere*, 502 U.S. at 532-33; but also has come to include the right to conduct area standards picketing and consumer boycott activity. *See, e.g., Sears Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978) ("[T]he right to organize is at the very core of the purpose for which the NLRA was enacted .... [whereas] [a]rea standards picketing has only recently been recognized as a § 7 right.").

As a general rule, the NLRA does not give nonemployees the right of access to employer's private property to exercise their Section 7 rights. Thus, the "essential issue" in the exercise of derivative Section 7 rights is often "the degree to which trespass is necessary to exercise Section 7 rights." *United Food and Commercial Workers, Local No. 880 v. NLRB*, 74 F.3d 292, 298-99 (D.C. Cir. 1996). Acknowledging the tension between labor rights and property rights, the Supreme Court has recognized that in certain limited circumstances, the NLRA "may entitle union employees to obtain access to an employer's property," *Thunder Basin Coal*, 510 U.S. 200, 217 n.21 (1990), while in others, an employer is entitled to exclude nonemployee union organizers from his property. *See Lechmere*, 502 U.S. at 540-41. The Court most recently construed the proper accommodation principles in *Lechmere*, which provides the starting point for our analysis.

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[4] "Nonemployees" denotes union representatives who are not employees of the targeted employer. *See O'Neil's Markets v. NLRB*, 95 F.3d 733, 736 n.4 (8th Cir. 1996).

In *Lechmere*, nonemployee union members engaged in an organizing campaign targeted at employees of a retail store situated on the Lechmere Shopping Plaza in Newington, Connecticut. Union members attempted to distribute handbills in the shopping plaza's private parking lot, but were barred from the property by the store owner. The Board applied the balancing test it had announced in *Jean Country*, 291 N.L.R.B. 11 (1988):

> [I]n all access cases our essential concern will be [1] the degree of impairment of the Section 7 right if access should be denied, as it balances against [2] the degree of impairment of the private property right if access should be granted. We view the consideration of [3] the availability of reasonably effective alternative means as especially significant in this balancing process.

Id. at 536 (quoting *Jean Country*, 291 N.L.R.B. at 14). Based on this analysis, the Board ruled that the employer had engaged in an unfair labor practice by excluding the union because "there was no reasonable, effective alternative means available for the Union to communicate its message to [Lechmere's] employees." *Lechmere, Inc.*, 295 N.L.R.B. 92, 93 (1989).

The Supreme Court, rejecting the Board's balancing test, reversed. It concluded that the employer had not engaged in an unfair labor practice. The Court held that Section 7 of the NLRA does not protect nonemployee union organizers' access to an employer's property except in the rare case where "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." 502 U.S. at 537 (internal citation and quotation marks omitted). The Court stated that its reference to " 'reasonable' attempts was nothing more than a commonsense recognition that unions need not engage in extraordinary feats to communicate with

inaccessible employees — [but was] not an endorsement of the view . . . that the Act protects 'reasonable' trespasses." *Id.*

At first blush, *Lechmere* appears to create a bright line rule that in all cases, employers may exclude nonemployees from their property (subject to the rare inaccessibility exception). *Lechmere* does not suggest, however, that the NLRA mandates exclusion; the decision simply recognizes that "arguable Section 7 claims do not pre-empt state trespass law." 502 U.S. at 535 (citing *Sears, Roebuck & Co.,* 436 U.S. at 205). The Court has since clarified this aspect of *Lechmere,* explaining that employers may exclude union organizers in deference to state common law, but not because NLRA itself restricts access. *See Thunder Basin Coal,* 510 U.S. at 217 n.21. "The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it." *Id. Thunder Basin Coal* thus makes plain what *Lechmere* left implicit: although the NLRA's protection of Section 7 rights does not trump state property rights, state property law is what creates the interest entitling employers to exclude organizers in the first instance. Where state law does not create such an interest, access may not be restricted consistent with Section 8(a)(1).

Connecticut law, which governed the shopping center in *Lechmere,* protected the owner's right to exclude others, including union organizers, as trespassers. *See Cologne v. Westfarms Assocs.,* 469 A.2d 1201, 1208-10 (Conn. 1984). As a result, the owner's exercise of his property right conflicted with the organizers' exercise of protected Section 7 rights, necessitating the accommodation analysis in which the Court engaged. *See* 502 U.S. at 538.

Lechmere did not speak to the situation where, as here, an employer's state law property right does not entitle it to

exclude organizers. The Board has recognized that in such cases, nonemployees' exercise of Section 7 rights creates no conflict as against any right of the employer. Although an employer's property rights "must be given appropriate respect, an employer need not be accorded any greater property interest than it actually possesses. Thus, the analysis that applies when Section 7 rights and property rights conflict is not appropriately invoked as to an employer that possesses only a property right that, under the law that creates and defines the employer's property rights, would not allow the employer to exclude the individuals." *Bristol Farms,* 311 N.L.R.B. at 438 (citing *Johnson & Hardin Co.,* 305 N.L.R.B. No. 83 (1991), *enforced in relevant part, Johnson & Hardin Co. v. NLRB,* 49 F.3d 237, 241-42 (6th Cir. 1995)). Accordingly, "an employer's exclusion of union representatives from private property as to which the employer lacks a property right entitling it to exclude individuals . . . violates Section 8(a)(1), assuming the union representatives are engaged in Section 7 activities." *Id.; see also O'Neil's Markets d/b/a/ Food For Less*, 318 N.L.R.B. 646, 649 (1995), *enforced*, 95 F.3d at 378-79.

In the administrative proceedings, the Board invoked the rule it has applied consistently since *Lechmere*, that Respondent had a threshold burden to establish an interest entitling it to exclude individuals from its property; and that in the absence of such an interest, "there is in fact no conflict between competing rights requiring an analysis and an accommodation under *Lechmere.*" *Calkins*, 1997 WL 397549, at *6. We conclude that consistent with *Thunder Basin Coal, supra*, the Board has correctly interpreted *Lechmere*; that when an employer lacks an interest entitling it to exclude individuals engaged in Section 7 conduct, *Lechmere's* accommodation analysis is not triggered.

Therefore, to evaluate the rights of the parties before us, we must examine two questions: first, whether the Union

members engaged in protected Section 7 activity; and second, whether Respondent possessed a property interest under California law entitling it to exclude that activity.

III

A

Respondent first argues that the Union members' conduct was not protected under Section 7 because whether conduct is protected turns not only on its purpose but also its location. This argument erroneously conflates the question of the scope of access to private property with the question of the nature of the protected conduct. It is well settled that *whether* conduct is protected by Section 7 of the NLRA, and *where* it may be exercised, are distinct inquiries. *See Eastex, Inc. v. NLRB,* 437 U.S. 556, 563 (1978). Thus, our first consideration is strictly limited to whether the Union was engaged in protected Section 7 conduct.

The Board has the responsibility in the first instance to delineate the precise boundaries of Section 7's mutual aid or protection clause. *See, e.g., Eastex,* 437 U.S. at 568 (citing *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 798 (1945)); *Sierra Publishing Co. v. NLRB,* 889 F.2d 210, 215 (9th Cir. 1989)). The Board has ruled that Section 7 protects nonemployees engaging in picketing or other publicity for the purpose of truthfully advising the public that an employer does not employ union members or have a contract with a labor organization. *See, e.g., Bristol Farms,* 311 N.L.R.B. 437; *D'Alessandro's Inc.,* 292 N.L.R.B. 81 (1988). This protection of consumer boycott and area standards picketing falls within the plain meaning of the last clause of Section 7, which provides union members the right to engage in concerted activities for "other mutual aid or protection." 29 U.S.C. § 157. The mutual aid or protection clause includes these activities because "a union has a legitimate interest in protecting the wage standards of its

members who are employed by competitors of the picketed employer." *Sears, Roebuck & Co.*, 436 U.S. at 206 n.42; *see also O'Neil's Markets*, 95 F.3d at 735 n.1 ("[A] union engages in area standards handbilling to protect the employment standards it has successfully negotiated in a particular geographic area from the unfair competitive advantage that would be enjoyed by an employer whose labor cost package was less than those of employers subject to the area contract standards.") (citation and internal quotation marks omitted).

Lechmere does not mandate a contrary result. *Lechmere* addressed the degree of access required for nonemployees' exercise of derivative activities on private property, but it did not alter whether consumer boycott activity in itself is protected by Section 7. *See United Food, Local No. 880*, 74 F.3d at 298-99; *Metropolitan District Council of Philadelphia v. NLRB*, 68 F.3d 71, 73 (3d Cir. 1995); *NLRB v. Great Scot*, 39 F.3d 678, 682 (6th Cir. 1994).

Moreover, this Court has identified Section 8(b)(7)(C) as the source of the specific right to engage in consumer boycott activity, noting that it "contains a proviso which allows a union to lawfully picket an 'employer for the purpose of truthfully advising the public (including consumers) that the employer does not employ members of, or have a contract with, a labor organization.'" *NLRB v. Musicians Union, AFM Local 6*, 960 F.2d 842, 845 (9th Cir. 1992) (quoting Section 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C)). We uphold the Board's conclusion that the Union's actions in picketing and handbilling truthfully to inform customers that Respondent did not employ members of a labor organization constituted protected Section 7 conduct.

B

We next consider whether Respondent's state law property rights encompass an interest which entitle Respondent to exclude Union organizers from the property. When interpreting state law, we are bound by the decisions of a state's highest court. *See Arizona Electric Power Cooperative, Inc. v. Berkeley,* 59 F.3d 988, 991 (9th Cir. 1995). "In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Id.* (citing *In re Kirkland,* 915 F.2d 1236, 1239 (9th Cir. 1990)).

Article I, section 2 of the California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. art I, § 2. The California Supreme Court has held that its state constitution provides broader free speech rights than does the First Amendment to the Constitution of the United States. *See Robins v. Pruneyard Shopping Ctr.,* 23 Cal.3d 899, 908, 153 Cal.Rptr. 854 (Cal. 1979), *aff'd* 447 U.S. 74 (1980) ("[A] protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press.") (hereinafter *"Robins"*) (quoting *Wilson v. Superior Court,* 532 P.2d 116 (Cal. 1975)). This protection is guaranteed not only for the value of expressive activity itself, but also as an "essential attribute of governing . . . vital to a basic process in the state's constitutional scheme — direct initiation of change by the citizenry through initiative, referendum, and recall." *Robins,* 23 Cal.3d at 907-08 (citing Cal. Const. art. II, §§ 8, 9, and 13).

Against this backdrop, California courts have granted broad protections to the peaceful exercise of free speech rights over property owners' exclusive control of their property. In *Robins,* the California Supreme Court held that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." *Id.* at 910. The Court recognized that a modern shopping center "to which the public is invited can provide an essential and invaluable forum for exercising [speech and petition] rights," *id.,* from which the owner is not entitled to prohibit publicly expressive activity. Upon granting certiorari, the United States Supreme Court affirmed the power of the states to adopt "individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard,* 447 U.S. at 81. That power even included California's decision to remove "one of the essential sticks in the bundle of property rights," the right to exclude others. *Id.* at 82.

Since then, the California courts have recognized that speech is protected not only in "shopping malls" but also on the privately-owned sidewalk of a stand-alone grocery store. *See Lane,* 71 Cal.2d at 878. In *Lane,* the California Supreme Court held that "when a business establishment invites the public generally to patronize its store and in doing so to traverse a sidewalk opened up for access by the public the fact of private ownership of the sidewalk does not operate to strip the members of the public of their rights to exercise First Amendment privileges on the sidewalk at or near the place of entry to the establishment." *Id.* The Court later approved the broader principle that "the location of the store whether it is on the main street of the downtown section of the metropolitan area, in a suburban shopping center or in a parking lot, does not make any difference." *Sears, Roebuck & Co.,* 25 Cal.3d at 332-33. There, the Court, considering the speech accommodation required on privately-owned sidewalks and parking lots that provide the

sole means of ingress and egress to stand-alone retail stores, explained that "[i]f we were to hold the particular sidewalk area to be 'off limits' for the exercise of First Amendment rights in effect we would be saying that by erecting a 'cordon sanitaire' around its store, [the store] has succeeded in immunizing itself from on-the-spot public criticism." *Id.* at 326-27 (citing *Lane*, 71 Cal.2d at 876). Thus, California law prohibits owners of shopping malls and general access supermarket stores from excluding speech activity on their private adjacent sidewalks and parking lots.[5]

An exception, within which Respondent claims to fall, is made for businesses found to be "modest retail establishments." *See Robins*, 23 Cal.3d at 910 (emphasizing that its holding does not apply to "the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment."). Whether the owner of a small business must open her property to free speech activities or is a "modest retail establishment" exempt from the *Pruneyard* doctrine depends on the nature and extent of public invitation to the property, and the nature, purposes, and primary

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[5]We reject Respondent's contention that *Lane* is no longer good law due to its reliance on *Logan Valley*. While Respondent is correct that *Hudgens* overruled *Logan Valley* to the extent that the First Amendment no longer protects peaceful picketing exercised in a shopping center, California appellate courts have invoked the California constitution as a source of protection for speech in shopping centers and other public settings. *See Bank of Stockton*, 44 Cal.App.4th at 1627-29 (recognizing overruling of *Logan Valley* but reaffirming *Lane* based on California constitutional law); *Feminist Women's Health Center*, 32 Cal.App.4th at 1660 (recognizing that despite *Lloyd* and *Hudgens*'s "more restricted view of First Amendment rights on private property", article I, section 2 of the California Constitution mandates that "free speech activities cannot be prohibited in a large private shopping mall.") (internal citations omitted). In the absence of contrary authority in the California appellate courts, we must predict that the California Supreme Court would render the same holding were the issue presented to it. *See Arizona Electric Power*, 59 F.3d at 991.

uses of the property. *See Planned Parenthood v. Wilson,* 234 Cal.App.3d. 1662, 1671, 286 Cal.Rptr. 427 (1991); *Allred v. Shawley,* 232 Cal.App.3d. 1489, 1501, 284 Cal. Rptr. 140 (1991); *Bank of Stockton v. Church of Soldiers of the Cross of Christ of the State of California,* 44 Cal.App.4th 1623, 1629-30, 52 Cal.Rptr.2d 429 (1996). None of these cases support Respondent's claim to the exception.

In *Planned Parenthood,* petitioners were engaged in antiabortion speech, leafleting, and demonstration activity in the private parking lot and driveway of respondent's medical clinic. 234 Cal.App.3d at 1666. The *Planned Parenthood* court rejected petitioners' reliance on *Lane,* and held that a private three-story medical center was "not the functional equivalent of a public place." 234 Cal.App.3d at 1672 (citation omitted). The court concluded that because the clinic offered professional medical services to specific clientele, did not generally invite the public to "congregate, relax, visit, seek out entertainment, browse and shop for personal, household or general business merchandise," not even pharmaceutical goods, *id.,* and provided parking only for "tenants" and "patients", the center was not devoted to public use in a manner sufficient to confer on that property the constitutional burden to guarantee the right of free expression. *Id.* at 1671. Similarly, *Shawley* held that a medical center could restrain the entry onto its private parking lot of antiabortion protesters engaging in speech and demonstration activities. 232 Cal.App.3d at 1504-05. The *Shawley* court also rejected petitioners' *Lane* argument, noting that whereas a retail store holds out an invitation to the entire buying public, the professional medical center required prior appointments for all of its patients and was not fully open to the local community, nor did it provide services which were essential to all community members as would a large supermarket-type grocery store. *Id.* at 1501. *See also Allred v. Harris,* 14 Cal.App.4th 1386, 1391, 19 Cal.Rptr. 530 (1993) (holding that private medical center was not constitutionally

compelled to allow access for free speech activity where the center provided services to specific clientele and posted signs reading "Patient Parking Only" in its parking lot); *Feminist Women's Health Center v. Blythe,* 32 Cal.App.4th 1641, 1661, 39 Cal.Rptr.2d 189 (1995) (upholding restriction against antiabortion speech activities in medical center parking lot as permissible limitation on free speech rights).

Thus, in each case, the courts have distinguished supermarket-type stores, which invite the public at large to shop and congregate, from medical clinics which do not invite the general public or have other attributes of a public forum. *Planned Parenthood* even implies that the presence of a retail pharmacy in the medical center might have affected its characterization because such a tenant would invite members of the public to shop and generally avail themselves of its merchandise. 234 Cal.App.3d at 1672; *but see Feminist Women's Health Ctr.,* 32 Cal.App.4th at 1661 (finding that, given the small size of the building and parking lot at issue, a private medical center that housed a retail pharmacy open to the public fell within the modest retail establishment exception)."

In the only non-abortion protest case in this area, *Bank of Stockton,* 44 Cal.App.4th at 1629-30, petitioner Church of Soldiers of the Cross of Christ of the State of California sought to solicit donations from a bank's customers on the private sidewalk in between the bank's privately owned parking lot and entrance. The court held that the bank, a two-story single-purpose building, was a modest retail establishment because it did not provide a place for the general public to congregate, because "indeed, security issues would make it undesirable to have the general public, that is, those who do not need to transact business with the Bank, present", and because "generally only those transacting business with the bank were invited to the property." 44 Cal.App.4th at 1630. As a result, the court held that the

bank was not a public forum as was a shopping center or supermarket-type store, and thus was not required to accommodate free speech on its private sidewalk. *Id.* at 1631.

The Board found that Respondent is not a modest retail establishment exempt from California's open access principles. The evidence in the record reflects that Respondent operates a large supermarket grocery outlet that is open to the general public for the purpose of browsing and shopping. The nature and extent of public invitation to the property is broad: the store is prominently located on California Route 111, a major site highway; customers need not make advance appointments to shop; and use of the property is not limited to specific clientele or purposes. Though the parking lot is designated for the use of employees and customers, there is no evidence that a customer who browses the store's merchandise but does not ultimately purchase items is considered a trespasser or is otherwise unwelcome to park and enter for that purpose.

The sole fact that might support Respondent's contention that its property is not unconditionally open to the public is the factually disputed evidence that in the summer of 1995, signs were posted on the property proclaiming: "Trespassers, solicitors or distribution of literature by non-employees is prohibited on this property." Even if true, however, posting a sign does not permit the supermarket owner to avoid his constitutional obligation. *See Robins,* 23 Cal.3d at 902.

Thus, we conclude that the California Supreme Court would hold that "[w]hatever 'modest retail establishment' means, it does not include . . . a 'large 'supermarket-type' grocery store.' " *Bank of Stockton,* 44 Cal.App.4th at 1629. Our review of the law and the evidence lead us to affirm the Board's determination that Respondent's Indio Grocery Outlet is not a modest retail establishment.

Respondent additionally asserts that general state trespass principles entitle him to exclude uninvited visitors. We reject this contention. "The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another." *Cassinos v. Union Oil Co.*, 14 Cal.App.4th 1770, 1778, 18 Cal.Rptr.2d 574 (1993) (citing *Civic Western Corp. v. Zila Industries, Inc.*, 66 Cal.App.3d 1, 16, 135 Cal.Rptr. 915 (1977)). However, "[a] peaceable entry on land by consent is not actionable." *Civic Western Corp.*, 66 Cal.App.3d at 17 (quoting 4 Witkin, *Summary of California Law* (8th ed. 1974) § 351, p. 2612). Contrary to Respondent's argument, *Robins* makes clear that the public character of a shopping center implicitly reflects consent by invitation to the public to come on the property.[6]

Respondent further argues that our decision in *Sparks Nuggets, Inc. v. NLRB*, 968 F.2d 991 (9th Cir. 1992), requires us to permit the exclusion of union organizers on Respondent's property. This is an incorrect interpretation of *Sparks Nugget*. In *Sparks Nugget*, we held that, pursuant to *Lechmere*, a Nevada casino owner was entitled to exclude nonemployee union organizers from engaging in picketing

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[6]The cases upon which Respondent relies are inapposite, and none support the proposition that free speech activity on privately owned shopping center property constitutes trespass. *See Cassinos*, 14 Cal.App.4th at 1778 (unauthorized injection of wastewater onto privately owned mineral estate constitutes trespass); *Civic Western Corp.*, 66 Cal.App.3d at 17 (cause of action for trespass is stated where debtor alleges that creditor may have exceeded consent conferred by security agreements in entering debtor's property to secure collateral); *Bauman v. Beaujean*, 244 Cal.App.2d 384, 389, 53 Cal.Rptr. 55 (1966) (trespass occurred when three year old child entered neighbor's residential backyard without invitation); *United States v. Imperial Irrigation District*, 799 F.Supp. 1052, 1959 (S.D. Cal. 1992) (United States government trespassed on Native American lands by flooding irrigation districts). It is clear that the state constitutional protection of free speech prohibits Respondent from excluding individuals engaged in speech activity pursuant to state trespass laws.

and handbilling directed toward customers in the private parking lot adjacent to the casino entrance. We reasoned that the inaccessibility exception did not apply because the target audience consisted of customers who were not isolated on the property. *See id.*, 968 F.2d at 998. In holding that *Lechmere* controlled, we did not explicitly address the scope of Sparks Nugget's property right to exclude.

Sparks Nugget was decided before *Thunder Basin*, however, in which the Supreme Court made clear that an inquiry into the property owner's right to exclude is a threshold determination, and may explain why we failed to plainly speak to the property interests underlying the accommodation question. Nevertheless, were we to explicitly consider Sparks Nugget's property interest under Nevada law, we would conclude that *Lechmere*'s accommodation analysis was properly invoked. Nevada law, unlike that of California, does not extend special protection to free speech interests at the expense of store owner's property interests.[7]

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[7] The Nevada Supreme Court has not construed its state constitutional free speech provision, article 1, section 9 of the Nevada Constitution, in the context of accommodation of speech on private property. Its only decisions addressing accommodation principles among speech and property rights have relied equally upon the First Amendment and the Nevada Constitution without distinguishing between them. *See Culinary Workers Union, Local No. 226 v. Eighth Judicial District Court*, 207 P.2d 990, 993 (Nev. 1949) (stating that peaceful picketing was protected by the Constitutions of the United States and of the State of Nevada); *City of Reno v. Second Judicial District Court*, 95 P.2d 994 (Nev. 1939) (holding that city ordinance that banned peaceful picketing violated federal and state constitutional free speech guarantees); *see also Venitian Casino Resort v. Local Joint Executive Board of Las Vegas*, ___ F. Supp. 2d ___, 1999 WL 253537 (D. Nev. Apr. 27, 1999) (holding that privately owned sidewalk in front of casino and connected on either side to public sidewalk constituted public forum for purposes of the First Amendment to the United States Constitution). The *Venitian* court recognized plaintiff's claim that Nevada law provides no greater protection for free speech rights on private property than does the

Instead, like the Connecticut law that underlay *Lechmere*, Nevada law allowed the casino owner to exclude the union members from its property.[8] As a result, the *Sparks Nugget* court properly invoked *Lechmere*'s accommodation principles notwithstanding its lack of an express discussion of Nevada property interests.

Because California and Nevada property law are materially different, *Sparks Nugget* does not control the accommodation analysis to be applied to California shopping mall and supermarket owners, as that result would restrict access of protected Section 7 activity where California state constitutional law guarantees that no other free speech may be restricted. Such a result is not the import of *Lechmere, Sparks Nugget,* or Section 7 of the NLRA. *See Thunder Basin Coal Co.,* 510 U.S. at 217 n.21.

Respondent additionally argues that *Sparks Nugget* protects its right to exclude the Union representatives on the ground that it distinguishes between direct and derivative Section 7 activity. We reject this claim. *Sparks Nugget* holds that *Lechmere*'s inaccessibility exception, permitting nonemployee union representatives to come on private prop-

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United States Constitution, but declined to rule on the basis of Nevada Constitutional law. *See* 1999 WL at *8 n.4.

[8] Moreover, Nevada state law restricts picketing during the pendency of a labor dispute, *see* Nev. Rev. Stat. § 614.160 ("it is unlawful for any person to picket on private property without the written permission of the owner . . . *even if* the private property is open to the public as invitees for business.") (emphasis added); unlike California law, which recognizes a labor exception to California's criminal trespass laws. *See* Cal. Ann. Penal Code § 522.1(a)(West 1999). We recognize that the Nevada provision has not been construed by the Nevada courts and accordingly does not assist us in determining the Nevada Supreme Court's construction of the state law. *See Venitian Casino Resort*, 1999 WL at *8 n.4. However, it is at least appreciable to note that in explicitly elevating property rights over labor rights, the Nevada statute stands in direct contrast to the California statute.

erty only when necessary to reach employees, is not applicable in the context of reaching consumers because consumers are not isolated on company property. 968 F.2d at 997-98. However, even though *Sparks Nugget* limits the inaccessibility exception, the inapplicability of the exception does not matter where, as here, the general rule of *Lechmere* does not apply.

V

Finally, Respondent argues that the need for a uniform, national labor law precludes Section 7 rights from being defined by individual state trespass laws. Because we accord deference to Board's interpretation of the NLRA, we lastly consider whether the Board's determination that accommodation of Section 7 activity depends in the first instance on an employer's state property rights is rational and consistent with the Act.

One purpose of Section 7 is to guarantee employees' rights to engage in concerted activities for "mutual aid or protection." 29 U.S.C. § 157. As discussed in Part II, Section 7 activity is subject to widely disparate accommodation on private property depending on the state in which the activity is exercised. To the extent that state law permits employers' exclusion of Section 7 conduct, the NLRA does not mandate accommodation. *See Thunder Basin Coal,* 510 U.S. at 217 n.21. To the extent that state law requires accommodation, the NLRA does not mandate exclusion. *See id.* Our holding today falls into the latter category, protecting Section 7 activity under the ambit of California constitutional law where *Lechmere* indicates it would not be protected by the NLRA alone.

A principal concern over "state inference with federally protected conduct" is the risk that the state will misinterpret the federal law, resulting in the "prohibition of protected conduct." *Sears, Roebuck & Co.,* 436 U.S. at 203. In this

case, *Lechmere* has already delineated the circumstances in which a state may prohibit protected conduct, that is in almost all circumstances in which its trespass law guarantees employers the right to exclude. State trespass law that does not guarantee the right to exclude causes no conflict, in that it does not prohibit federally protected conduct; instead, such law grants broader accommodation of protected conduct than is required by the federal labor law. Thus, where California mandates that its shopping center owners grant access to those engaged in expressive activity, "the requisite accommodation has taken place." *See Lechmere,* 502 U.S. at 538.

We find no reason to believe that California's provision of additional access conflicts with the federal scheme. As one prescient commentator noted: "If states choose to modify their property laws, and to subtract from the owner's bundle of property entitlements, the federal interest in access then pushes against an open door. There is no federal justification for barring states from allowing access when the only reason federal law did not provide the access was a deference to supposed state law opposing it." Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization,* 7 Yale J. on Reg. 355, 417 (Summer 1990). This analysis fully accords with NLRA preemption principles.[9] "The NLRA contains no express preemption provision." *Building and Construction Trades Council v. Associated Builders and Contractors,* 507 U.S. 218,

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[9]Certainly, California's constitutional and common law guarantees of free speech are not a "regulation" *per se* subject to traditional preemption analysis. *See Building and Construction Trades Council,* 507 U.S. at 227 ("pre-emption doctrines apply only to state regulations"). However, to the extent that California law affects the zone protected by the NLRA, analysis of the hierarchy of state and federal law in this area is helpful to determine whether the rule incorporating state law is consistent with the Act. *See id.* ("A state does not regulate . . . simply by acting within one of these protected areas.").

224 (1993). State regulation of activities protected by Section 7 of the NLRA should not be preempted "unless [the state regulation] conflicts with federal law or would frustrate the federal scheme, or unless [we] discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Id.* (citing *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 747-48(1985)). The Court is "reluctant to infer preemption." *Id.* (citing *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992)). "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Id.* (citing *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981)).

In this case, allowing state law to provide greater accommodation of Section 7 activity does not conflict with the NLRA because it does not "set forth standards of conduct inconsistent with the substantive requirements of the NLRA." *See id.* at 225 (citing *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 (1959)). Because the Board's rule grants more accommodation to the Union than is required by federal law, without interfering with protected conduct, we conclude that it is a rational and permissible construction of the Act, and therefore find no reason to disturb it.

CONCLUSION

We uphold the Board's rule, that in cases in which the exercise of Section 7 rights by nonemployee Union representatives is assertedly in conflict with a respondent's private property rights, the respondent bears a threshold burden to establish that it had, at the time it expelled the Union representatives, an interest which entitled it to exclude individuals from the property. We also uphold the Board's finding that the Indio Grocery Outlet was not a modest retail establishment, and its conclusion that under California

law Respondent had no right to exclude the public from the property. We further uphold the Board's findings in this case, that the Union was engaged in conduct protected by Section 7 of the Act. Therefore, we GRANT enforcement of the Board's order concluding that Respondent's interference with the Union's protected conduct constituted a violation of Section 8(a)(1) of the NLRA.

ORDER ENFORCED.

COUNSEL

Richard Cohen, National Labor Relations Board, Washington, D.C., for the petitioner.

Gregory N. Karaskik, Knee & Ross, Los Angeles, California, for the respondent.

APPENDIX C

323 NLRB 1138
323 NLRB No. 196, 155 L.R.R.M. (BNA) 1210
(Cite as: 323 NLRB 1138, 1997 WL 397549 (N.L.R.B.))

NATIONAL LABOR RELATIONS BOARD
(N.L.R.B.)

**1 *1138 GARY E. CALKINS AND ANNA ROSA CALKINS, d/b/a INDIO GROCERY OUTLET
And
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1167, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

Cases 21-CA-30424 and 21-CA-30614
June 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On charges filed by the Union on December 15, 1994 in Case 21-CA-30424, and on April 5, 1995, in Case 21-CA-30614, the General Counsel of the National Labor Relations Board by the Regional Director for Region 21 issued an order consolidating cases, consolidated amended complaint, and amended notice of hearing on April 25, 1995. The complaint in essence alleged that the Respondent violated Section 8(a)(1) of the Act by threatening to have union representatives arrested if they did not cease picketing and distributing union-related literature on the Respondent's premises; by requesting police officers to arrest such representatives for engaging in these activities; and by attempting to cause and/or causing police officers to arrest Union Representative Joseph Duffle because he refused to cease picketing and distributing union-related literature on the

Respondent's premises. On May 10, 1995, the Respondent filed an answer admitting in part and denying in part the allegations of the complaint, and denying that it had violated the Act.

On July 24, 1995, the General Counsel, the Respondent, and the Union filed with the Board a stipulation of facts. The parties agreed that the charges, the consolidated amended complaint, the answer to the consolidated amended complaint, the order postponing hearing indefinitely, and the stipulation of facts with attached exhibits constitute the entire record in this case. The parties further stipulated that they waived a hearing and the making of findings of fact and conclusions of law, and the issuance of a decision by an administrative law judge.

On September 18, 1995, the Board issued an Order approving the stipulation of facts and transferring the proceeding to the Board. The General Counsel, the Respondent, and the Union subsequently filed briefs.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Gary E. Calkins and Anna Rosa Calkins have been the sole proprietors and operators of a retail grocery store located in Indio, California, known as the Indio Grocery Outlet (the Respondent). During the 12-month period ending April 21, 1995, the Respondent derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 from the other enterprises located within the State of California, each of which other enterprises had received these goods directly from points located outside the State of California. We find that the Respondent is an employer engaged in commerce

within the meaning of Section 2(2), (6), and (7) of the Act.

We further find that the Union, United Food and Commercial Workers Union, Local 1167, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

**2 The Respondent's retail grocery store occupies a 20,500-square-foot building. [FN1] The building, which is open to the general public, is freestanding and is not part of a shopping mall. The lot is bounded by Highway 111 on the south, and two surface streets: Salton Street on the west, and Fowler Street on the east. There is a parking lot on the west and south sides of the store, which is for the use of customers and employees of the Respondent. There are two entrances to the parking lot, and it is surrounded on three sides by a public sidewalk, with approximately 140-foot by 62-foot grass lot on the east side which separates a portion of the parking lot from the public sidewalk. There are two entrances into the store, and a walkway runs along the front of the store. There is a factual dispute as to whether there were signs prohibiting "trespassers, solicitors, or distribution of literature by non-employees" posted near the two entrances prior to the summer of 1995. [FN2] The parties stipulated, however, that persons other than employees and customers of the store are excluded from the store's premises.

On September 30, 1994, 11 picketers representing the Union gathered at the Respondent's parking lot. [FN3] When asked to leave the parking lot, the picketers relocated to the public sidewalk.

*1139 On December 13, 1994, approximately eight or nine union picketers engaged in peaceful picketing and handbilling at the Respondent's store. There was one picketer stationed by each of the two entrances to the store, and some picketers were walking around the parking lot in front of the store. The remaining picketers were on the public sidewalk. The picketers carried signs which measured 14 inches in width and 23 inches in length, and which read in English and Spanish:

> PLEASE DO NOT SHOP GROCERY OUTLET UFCW LOCALS #1167

The picketers also handed out leaflets to the Respondent's customers and employees, which stated

> DON'T SHOP CANNED FOODS GROCERY OUTLET INDIO SUPPORT YOUR UNION NEIGHBORS

and requested patrons to shop at certain nearby union stores.

That same day, Gary Calkins asked the picketers to leave the parking lot and the walkway in front of the store. The picketers refused to do so. Approximately 10 to 15 minutes later, Calkins and three of the Respondent's employees began a counter leafletting campaign outside the store, with handbills that were signed by the employees and stated that none of the people picketing were the Respondent's employees, that the employees were happily employed and were receiving competitive wages and benefits, that it was a family owned and operated store, and that the employees were inside the store ready to serve the customers.

Later that day, Calkins summoned the police and asked them to remove the picketers from the walkway in front of the store and from the parking lot. The police officers declined to do so, and Calkins asked the police about making citizen's arrests of the picketers. [FN4] The police officers told Calkins they would look into the matter. Cal-

kins concluded the conversation by stating that if the picketers did not leave his property, he would request the police to make a citizen's arrest. Thereafter, the picketers left the Respondent's property and relocated to the public sidewalks. Calkins told the picketers that he would request the police to arrest them if they returned to the store's premises. Also, after the picketing had ended that day, the Union was informed by the local police department that Calkins had requested that the police make citizen's arrests of picketers who came on to his property.

**3 On March 29, 1995, union picketers engaged in peaceful picketing and handbilling at the Respondent's premises. There were approximately the same number of picketers engaging in the same activities as on December 13, 1994, plus two union employees taking photographs. Calkins asked the picketers to leave the store premises, and advised picketer Duffle that he had called the police and that if the police did not arrive in 10 minutes, he would place the picketers who were still on the premises under citizen's arrest.

When the police arrived, all of the picketers except Duffle moved to the public sidewalk areas. A police officer told Duffle that if he did not leave voluntarily, Calkins could request the officer to place Duffle under citizen's arrest. Duffle still refused to move. Calkins then requested that Duffle be placed under citizen's arrest, which the police officer did by issuing a citation against Duffle which charged him with trespassing. [FN5]

Since March 29, 1995, the union picketers have confined their activities to the public sidewalks surrounding the Respondent's parking lot.

B. Issue

The issue is whether the Respondent violated Section 8(a)(1) of the Act by threatening to have union representa-

tives arrested if they did not cease picketing and distributing union-related literature on the Respondent's premises on December 13, 1994, and March 29, 1995; by requesting police officers to arrest such representatives for engaging in these activities on December 13, 1994; and by attempting to cause and/or causing police officers to arrest Union Representative Duffle because he refused to cease picketing and distributing union-related literature on the Respondent's premises on March 29, 1995.

C. Contentions of the Parties

The General Counsel, noting that it is state law that determines an employer's property interests, contends that the Board has acknowledged that under California law there is no property right that would entitle an employer like the Respondent to exclude nonemployee union representatives from conducting peaceful picketing and handbilling, citing *Payless Drug Stores,* 311 NLRB 678 (1993), *enf. denied on other grounds by unpublished decision* (9th Cir. May 8, 1995), and *Bristol Farms,* 311 NLRB 437 (1993). The General Counsel notes that in *Robins v. Pruneyard Shopping Center,* 153 Cal.Rptr. 854, 592 P.2d 341 (Cal. 1979), *affd.* 447 U.S. 74 (1980), the California Supreme Court found that a large shopping center had taken on the *1140 character of a "traditional public forum," and that expressive activities at the shopping center were protected by article I, section 2 of the California Constitution. [FN6] The General Counsel further notes that the California Supreme Court had applied the *Pruneyard* rationale to a freestanding supermarket in an earlier case, *In re Lane,* 79 Cal.Rptr. 729, 457 P.2d 561 (Cal. 1969). The General Counsel contends that the Respondent is not a "modest retail establishment," which the California Supreme Court in *Pruneyard* distinguished from a large shopping center and to which it would not apply the state constitutional protection, but rather is more akin to a large shopping center given

its size of over 20,000 square feet of floor area on a 2.4-acre lot.

**4 Alternatively, the General Counsel argues that there is a statutory basis in California state law for protecting the Union's activities on the Respondent's property in addition to the state constitutional basis defined in *Pruneyard,* above. The General Counsel notes that section 602(n) of the California Penal Code, the criminal trespass section under which Duffle was cited, has been held by the California Supreme Court not to apply to "lawful" union activities on private property, citing *In re Zerbe,* 36 Cal.Rptr. 286, 388 P.2d 182 (1964). The General Counsel thus asserts that under California law, the Respondent has no property interest enabling it to arrest, or threaten to arrest, the picketers, apart from whatever civil remedies the Respondent might have.

The Charging Party argues that because the Respondent is not the owner of the property, but rather appears to be a lessee, it therefore cannot claim a bright of ownership and has no property right entitling it to exclude the union agents. The Charging Party also cites the California Supreme Court's finding in *In re Lane,* above, claiming that the court held that handbilling on a private sidewalk outside an entrance to a privately owned store was permissible, especially where such action was protected as free speech. The Charging Party also states that there is no evidence in the instant case that the picketers and handbillers interfered with the ingress and/or egress of would-be customers. The Charging Party further asserts that the Union's activity here was protected conduct under Section 7 of the Act.

The Respondent argues that under California law, it, as a tenant with an exclusive right to operate the store, has a right to exclude uninvited persons from the premises. In this regard, the Respondent contends that one need not be an owner of the property to bring an action for trespass, but

need only be in actual possession of the property. The Respondent also asserts that the instant case does not present a "disparate treatment" issue, noting that the picketers and handbillers here were not employees of the Respondent and that it is undisputed that all persons other than customers and employees are excluded from the Respondent's premises.

The Respondent further argues that *Pruneyard,* above, which involved a large shopping complex that the court analogized to a "town center," does not apply in the instant case because *Pruneyard* specifically excluded from its reach "a modest retail establishment," which the Respondent contends its stand-alone store is. [FN7] The Respondent further argues that unlike the mall in *Pruneyard,* it has not opened its small private parking lot to the general public but rather has limited it to use by the Respondent's employees and customers; and thus, under California law, the parking lot is not sufficiently dedicated to public use to entitle the picketers to assemble in it, *citing Allred v. Shawley,* 284 Cal. Rptr. 140 (Cal. App. 4 Dist. 1991).

**5 The Respondent also contends that *In re Lane,* above, is inapplicable to the instant case for two reasons. First, the Respondent states that *Lane* did not address what rights, if any, a union member handbilling on private property had under California state law, but rather relied on the then-controlling United States Supreme Court precedent, notably in *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U.S. 308 (1968), holding First Amendment rights applicable to such a situation. The Respondent further notes that *Logan Valley* was subsequently overruled in *Hudgens v. NLRB,* 424 U.S. 506 (1976). The Respondent thus argues that *Lane* cannot be relied on as support for the argument that the union picketers had some right under California law to enter onto the Respondent's property. Second, the Respondent contends that *Lane* is factually

distinguishable from the instant case, because in *Lane,* unlike here, the public sidewalks were located so far away from the intended recipients of the demonstrators' messages that the messages could not be conveyed effectively from the public sidewalks.

The Respondent alternatively contends that even if *Pruneyard* allowed the picketers access to the Respondent's premises, the California courts have acknowledged the rights of property owners to restrict activities that interfere with normal business operations, as well as the rights of property owners to control ingress and egress, litter, and traffic hazards on their premises. The Respondent contends that in the instant case the picketers accosted customers to pass out handbills, and that the carrying of picket signs is itself *1141 disruptive and potentially threatening and/or coercive conduct. The Respondent also states that *Savage v. Trammel Crow Co.,* 273 Cal.Rptr. 302, 307-308 (Cal. App. 4 Dist. 1990), indicated that a ban on leafletting in a shopping center's parking lot was appropriate because it was content-neutral and was narrowly tailored to meet the shopping center's interest in controlling litter and traffic, and because the leafletters could leaflet on the shopping center's sidewalks. The Respondent argues that it therefore did not violate Section 8(a)(1) of the Act by asking the picketers to leave the parking lot and entrance way and to relocate to the nearby public sidewalk.

The Respondent also argues that because the picketing in this case was conducted by nonemployees and was directed to the Respondent's customers rather than to the Respondent's employees, the picketer's conduct was not protected by the Act because it was not aimed at organizing the employees or otherwise protecting their Section 7 rights, citing *Sparks Nugget, Inc. v. NLRB,* 968 F.2d 991, 997 (9th Cir. 1992). Finally, the Respondent notes that the United States Supreme Court, in *Lechmere, Inc. v. NLRB,* 502 U.S.

527, 538 (1992), held that nonemployees may not trespass on an employer's property to conduct union organizing activities unless the union can show that the employees are beyond the reach of other reasonable means to communicate with them, and that the Board has applied the "inaccessibility" rule of *Lechmere* to "area standards" and "consumer boycott" picketing by unions. [FN8] The Respondent asserts that the General Counsel has not and cannot meet his burden of showing that there are no reasonable alternative means of communicating the Union's message to the Respondent's customers without trespassing on the Respondent's property. Specifically, the Respondent contends that the General Counsel has not shown that the Union is unable to communicate with the Respondent's customers through picketing on the public sidewalk surrounding the Respondent's premises, and that the General Counsel has not presented any evidence regarding the use of the mass media to publicize the Union's message.

D. Discussion

****6** The Board has stated that "in cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the union representatives, an interest which entitled it to exclude individuals from the property [emphasis in original]." *Food for Less,* 318 NLRB 646, 649 (1995), *aff'd. in relevant part* 153 LRRM 2291 (8th Cir. 1996). *See, e.g., Payless Drug Stores,* 311 NLRB 678 (1993), *enf. denied on other grounds by unpublished decision* (9th Cir. May 8, 1995); and *Bristol Farms,* 311 NLRB 437, 438 (1993). "In the absence of such a showing there is in fact no conflict between competing rights requiring an analysis and an accommodation under *Lechmere, supra.*" *Food for Less,* above at 649. In determining whether an adequate property interest has been

shown, we look to the law that created and defined the Respondent's property interest, which is state, rather than Federal, law. *Bristol Farms,* above at 438.

To determine the nature and extent of the Respondent's property interest in the parking lot and the walkway in front of its store, we must, therefore, look to the law of the State of California, the state where the Respondent's store is located. Under California law, neither a shopping center nor its individual tenants have a right to prohibit individuals from handbilling or picketing on the shopping center premises, even though the shopping center is privately owned. *Bristol Farms,* above at 439. In *Robins v. Pruneyard Shopping Center,* 153 Cal.Rptr. 854, 592 P.2d 341 (Cal. 1979), *affd.* 447 U.S. 74 (1980), which involved high school students soliciting signatures for a petition opposing a United Nations resolution, the California Supreme Court concluded that a shopping center's property right was limited by the free speech and petition sections of the California constitution. [FN9] In so holding, the court relied, *inter alia,* on prior California Supreme Court decisions which found that a shopping center lacked the right to enjoin as trespass a union's picketing on the privately owned sidewalk in front of a bakery within the shopping center, *Schwartz-Torrance Investment Corp. v. Bakery Workers Local 31,* 40 Cal.Rptr. 233, 394 P.2d 921 (Cal. 1964), and that a local trespass ordinance could not prohibit a union officer from distributing handbills on a privately owned sidewalk outside a doorway to a supermarket, *In re Lane,* 79 Cal.Rptr. 729, above. *Bristol Farms,* above, at 439.

**7 In *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, above, the Supreme Court upheld the California Supreme Court's ruling against constitutional attack. Specifically, it held that California had the "right to grant more expansive rights of free speech and petition than conferred by the Federal Constitution," i.e., that this did not violate

the Federal constitutional protection against a taking of property without due process and just compensation, 447 U.S. at 81-85. Subsequently, a California appellate court extended *Pruneyard* to permit *1142 the distribution of union handbills at a shopping center. [FN10] *Bristol Farms,* above at 439.

Here, as in *Bristol Farms* and *Payless Drug Stores,* we find that under California law the Respondent did not have a right to exclude the union agents from the walkway in front of its store and from its parking lot, and that it would not have possessed such a right even if it had possessed complete ownership of the walkway and parking lot. [FN11] Thus, the union agents engaging in Section 7 activities [FN12] on that walkway and parking lot did not interfere with any property right of the Respondent. [FN13] The law concerning conflicts between Section 7 rights and property rights articulated in *Lechmere* is, therefore, not applicable to this case.

In so finding, we reject the Respondent's argument that the Respondent's store was the sort of "modest retail establishment" which the court in *Pruneyard,* above, excluded from its reach. [FN14] Rather, we find the instant case analogous to *In re Lane,* above, which involved a 24,000-square-foot stand-alone grocery store that was not part of a shopping center. Here, the Respondent's grocery store is 20,500 square feet, and is similarly a stand-alone store. [FN15] Further, subsequent California cases have cited *Lane* approvingly, [FN16] with one case noting specifically that *Lane* has not been overruled or eroded in later cases. *Sears, Roebuck & Co.,* 158 Cal.Rptr. 370, 378, 599 P.2d 676 (1979). [FN17] As the court in *Sears* concluded, under California state law, "[t]he sidewalk outside a retail store has become the traditional and accepted place where unions may, by peaceful picketing, present to the public their views respecting a labor dispute with that store.... In such

context the location of the store whether it is on the main street of the downtown section . . . in a suburban shopping center or in a parking lot, does not make any difference." *Sears,* above at 381.

**8 Thus, under the settled precedent discussed above, we find that the Respondent violated Section 8(a)(1) of the Act by threatening to have union representatives arrested if they did not cease picketing and distributing union-related literature on the Respondent's premises on December 13, 1994, and March 29, 1995; by requesting police officers to arrest such representatives for engaging in these activities on December 13, 1994; and by attempting to cause and/or causing police officers to arrest Union Representative Duffle because he refused to cease picketing and distributing union-related literature on the Respondent's premises on March 29, 1995.

CONCLUSION OF LAW

By threatening to have representatives of United Food and Commercial Workers Union, Local 1167, United Food and Commercial Workers International Union, AFL-CIO-CLC, arrested if they did not cease *1143 picketing and distributing union-related literature on the Respondent's premises on December 13, 1994, and March 29, 1995; by requesting police officers to arrest such representatives for engaging in these activities on December 13, 1994; and by attempting to cause and/or causing police officers to arrest Union Representative Duffle because he refused to cease picketing and distributing union-related literature on the Respondent's premises on March 29, 1995, the Respondent has violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act, we shall order it to cease and desist and to take certain affirmative action that will effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Gary E. Calkins and Anna Rosa Calkins, d/b/a Indio Grocery Outlet, Indio, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to have representatives of United Food and Commercial Workers Union, Local 1167, United Food and Commercial Workers International Union, AFL-CIO-CLC, arrested if they do not cease picketing and distributing union-related literature on the Respondent's premises; requesting and attempting to cause and/or causing police officers to arrest such representatives for engaging in such activity, as long as that activity is conducted by a reasonable number of persons and does not unduly interfere with the normal use of facilities or operation of businesses not associated with the Respondent's store.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extent not already done, immediately withdraw any and all criminal trespass proceedings against Joseph Duffle, and inform him in writing that this has been done.

(b) Within 14 days after service by the Region, post at its store in Indio, California, copies of the attached notice marked "Appendix." [FN18] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 1994.

**9 (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

FN1. The Respondent leases these premises from Canned Foods, Inc., the lessor of the property on which the Respondent is located. The real property and building are owned by Read Properties. The Respondent's lease was modified in July 1995, after the operant facts in the instant case occurred, to include the following provision:

Operator shall maintain physical control of the Store and be responsible for its safe and efficient operation during the term of this Agreement. Operator shall have the right and the duty to exclude from the Store trespassers, solicitors, vagrants and other unauthorized persons or objects. . . .

FN2. Resolution of this factual dispute is not necessary in light of our analysis of this case, discussed below.

FN3. The Respondent's employees are not represented by the Union or by any other union. The employees did not participate in the Union's picketing or handbilling at issue here.

FN4. We note that the parties have not stipulated or otherwise explained in the record or in their briefs what they mean by the term "citizen's arrest."

FN5. On July 13, 1995, the General Counsel was advised by the Riverside County District Attorney that the case against Duffle had been dropped.

FN6. Art. 1, sec. 2 of the California Constitution provides:

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

FN7. The Respondent contrasts its allegedly small, stand-alone store with the 21-acre, multistore shopping, dining, and entertainment complex in *Pruneyard.*

FN8. *Leslie Homes, Inc.,* 316 NLRB 123 (1995); *Loehmann's Plaza,* 316 NLRB 109 (1995).

FN9. The California Supreme Court in *Pruneyard* found that the shopping center could, however, adopt reasonable time, place, and manner rules concerning the exercise of free speech in the shopping center.

FN10. *Northern California Newspaper Organizing Committee v. Solano Associates,* 239 Cal.Rptr. 227 (Cal. App. 1 Dist. 1987).

FN11. In light of this conclusion, we find it unnecessary to pass on the exact nature of the Respondent's property interest under the terms of its lease. We also find it unneces-

sary to pass on the General Counsel's alternative argument concerning California's criminal trespass laws.

FN12. Contrary to the Respondent's contention that the union agents' picketing and handbilling here was not protected by the Act, we find that their conduct was clearly protected under the second proviso to Sec. 8(b)(7)(C), which concerns picketing or other publicity for the purpose of truthfully advising the public that an employer does not employ members of, or have a contract with, a labor organization. The right of union representatives to engage in this type of activity is well established. *Bristol Farms,* above at 438 fn. 8, and cases cited there.

FN13. We note that there is no evidence that the Respondent had adopted any reasonable time, place, or manner rules concerning picketing or handbilling in the parking lot and on the walkway in front of its store, assuming arguendo that it had an adequate property interest to do so. *Bristol Farms,* above at 439 fn. 10. Further, despite the Respondent's contention that the picketers accosted customers to pass out leaflets and that the act of picketing is itself disruptive and potentially threatening conduct, and its intimation that the leafletting was causing a litter problem, we note that the Respondent presented no evidence in support of these contentions and that in fact the parties' stipulation of facts refers to the picketing and handbilling as "peaceful." Thus, we find that the Union's picketing and handbilling did not interfere with the Respondent's operation of its business or with its customers' ingress to and egress from its store.

FN14. We also reject the Respondent's contention that the parking lot surrounding the Respondent's store is not open to the general public but is limited to use by the Respondent's employees and customers. As the California Supreme Court stated in *Lane* regarding the sidewalk surrounding the store in that case, "Certainly, this sidewalk is not private in the sense of not being open to the public. The

public is openly invited to use it in gaining access to the store and in leaving the premises." *Lane,* above at 733.

FN15. We also reject the Respondent's contention that *Lane* is distinguishable from, the instant case because in *Lane,* unlike here, the public sidewalks were located so far away from the intended recipients of the union's message that the message could not be conveyed effectively from the public sidewalks. In *Lane,* the court noted that the public sidewalk was located some 150 to 280 feet from the store. In the instant case, the public sidewalk that is parallel to the front of the store is 230 feet from the store; the public sidewalk that is parallel to the sides of the store is, at its closest distance, approximately 100 feet from the store's entrance. We view this as a sufficiently far distance to make the instant case indistinguishable from Lane in this respect.

FN16. *See, e.g., Family Planning Alternatives v. Pruner,* 15 Cal.Rptr. 2d 316, 322 (Cal. App. 6 Dist. 1992); *Allred v. Shawley,* 284 Cal.Rptr. 140, 146, 148 (Cal. App. 4 Dist. 1991).

FN17. In this regard, the California Supreme Court in *Sears,* above, noted that *Lane* relied on both Federal free speech guarantees as set out in *Food Employees v. Logan Plaza (Logan Valley),* 391 U.S. 308 (1968), and on state labor law as established in *Schwartz-Torrance,* above. Thus, although the Supreme Court in *Hudgens v. NLRB,* 424 U.S. 507 (1975), overruled *Logan Valley* and held that the First Amendment does not protect picketing on shopping center property, state labor law may still grant unions rights to conduct activities on the employer's property regardless of any claim of Federal constitutional right. *Sears,* above at 376-378. Thus, we reject the Respondent's contention that *Lane* can no longer be relied on to support the rights of union picketers to picket on an employer's property because *Hudgens* overruled *Logan Valley,* and its contention that

Lane relied only on the First Amendment and did not address California state law in its holding.

FN18. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government **10 The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to have representatives of United Food and Commercial Workers Union, Local 1167, United Food and Commercial Workers International Union, AFL-CIO-CLC, arrested if they do not cease picketing and distributing union-related literature on our premises; request, and attempt to cause and/or cause police officers to arrest such representatives for engaging in such activity, as long as that activity is conducted by a reasonable number of persons and does not unduly interfere with the normal use of facilities or operation of businesses not associated with our store.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, to the extent not already done, immediately withdraw any and all criminal trespass charges against Joseph Duffle, and inform him in writing that this has been done.

INDIO GROCERY OUTLET

323 NLRB 1138, 323 NLRB No. 196, 1997 WL 397549 (N.L.R.B.), 155 L.R.R.M. (BNA) 1210

Supreme Court, U.S.
FILED
MAR 27 2000
CLERK

(2)

No. 99-1413

In the Supreme Court of the United States

GARY E. CALKINS AND ANNA ROSA CALKINS, DBA INDIO GROCERY OUTLET, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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2pp

QUESTION PRESENTED

Whether the National Labor Relations Board and the court of appeals properly interpreted California law to conclude that, in the circumstances of this case, state law did not afford the employer supermarket the right to exclude, from the privately owned property surrounding the supermarket, union representatives who wished to peacefully picket and handbill in support of a labor dispute with the employer.

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In the Supreme Court of the United States

No. 99-1413

GARY E. CALKINS AND ANNA ROSA CALKINS, DBA INDIO GROCERY OUTLET, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B28) is reported at 187 F.3d 1080. The decision and order of the National Labor Relations Board (Pet. App. C1-C20) is reported at 323 N.L.R.B. 1138.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1999. A petition for rehearing was denied on November 16, 1999 (Pet. App. A1). The petition for a writ of certiorari was filed on February 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a retail supermarket located in Indio, California. The supermarket occupies a free-standing, 20,500 square-foot building, and is not part of a shopping mall. Pet. App. B2-B3, C3.[1] The parking lot, located on the west and south sides of the building, has two entrances and is surrounded on three sides by a public sidewalk. *Id.* at B3, C3. Across the public sidewalk, the property is bordered by public streets and a state highway. The supermarket itself has two entrances, which can be accessed only through the parking lot. A walkway runs in front of the store. *Ibid.* While the supermarket is open to the general public, persons other than customers and employees are generally excluded from the premises. *Ibid.* Petitioner's employees are not represented by a union. *Id.* at B3, C16 n.3.

On December 13, 1994, eight or nine representatives of Local 1167, United Food and Commercial Workers International Union (Union), who were not employees of petitioner, engaged in peaceful picketing and handbilling in the supermarket's parking lot and on the walkway in front of the store, as well as on the public sidewalk. Pet. App. B3-B4, C4, C16 n.3. The Union representatives' activity did not interfere with the supermarket's operations or with customers' ingress to and egress from the store. *Id.* at C17 n.13. The picketers carried signs which read: "Please Do Not Shop Grocery Outlet. UFCW Local 1167." The picketers also distributed a handbill to customers and em-

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[1] Petitioner operates the supermarket pursuant to a lease agreement with another entity, Canned Foods, Inc., which in turn leases the building and surrounding real property from the owner, Read Properties. Pet. App. B2, C15 n.1.

ployees of the store, which read: "Don't Shop Canned Foods Grocery Outlet Indio. SUPPORT YOUR UNION NEIGHBORS! UFCW Local 1167." The handbill listed the names and addresses of four unionized stores in the area. *Id.* at B4, C4. Gary Calkins, petitioner's proprietor, asked the picketers to leave the parking lot and the walkway in front of the supermarket, but they refused. *Id.* at B2, B4, C4. Later in the day, Calkins summoned the police and asked them to remove the picketers from the premises. The police declined to arrest or interfere with the picketers. Nonetheless, Calkins told the picketers that if they did not leave the premises, he would ask the police to make a "citizens' arrest." The picketers then relocated to the public sidewalk. *Id.* at B4-B5, C4-C5.

On March 29, 1995, approximately the same number of Union representatives resumed peaceful picketing and handbilling on the walkway in front of the supermarket and in its parking lot. Calkins again asked the picketers to leave and advised one of them, Joe Duffle, that he had called the police. Pet. App. B5, C5, C16 n.3. When the police arrived, all of the picketers except Duffle relocated to the public sidewalk. When Duffle refused to move to the sidewalk, Calkins asked a police officer to arrest him. The police officer did so, but the matter was later dropped. *Id.* at B5, C16 n.5.

2. Acting on charges filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint alleging, *inter alia*, that petitioner's threat to seek the arrest of any picketers who failed to remove themselves from the parking lot or the walkway in front of the supermarket contravened Section 8(a)(1) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(a)(1). That provision makes it an unfair labor practice for an employer "to interfere with,

restrain, or coerce employees in the exercise of" rights guaranteed by Section 7 of the Act, 29 U.S.C. 157, including the right "to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * other mutual aid or protection." Pet. App. C1-C2. The General Counsel, petitioner, and the Union agreed to waive a hearing before an administrative law judge, and submitted the matter to the Board for decision on a stipulated record. *Id.* at B6, C2.

The Board sustained the allegations of the complaint. Pet. App. C1-C20. First, the Board concluded that, apart from the location of the activity, the Union representatives' picketing and handbilling was protected by the Act. *Id.* at C12, C17 n.12.[2] Next, the Board explained that, "in cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with [an employer's] private property rights, there is a threshold burden on the [employer] to establish that it had, at the time it expelled the union representatives, an interest which entitled it to exclude individuals from the property." *Id.* at C10 (quoting *O'Neil's Mkts., Inc., d/b/a Food For Less*, 318 N.L.R.B.

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[2] See, *e.g.*, *D'Alessandro's, Inc.*, 292 N.L.R.B. 81, 83 (1988) (picketing and handbilling by nonemployees of employer, informing the public that employer is nonunion and requesting customers to patronize unionized stores, "clearly is concerted activity that falls within the 'mutual aid or protection' language of Section 7" of the Act, 29 U.S.C. 157); *Bristol Farms, Inc.*, 311 N.L.R.B. 437, 438 n.8 (1993) (such activity is "clearly protected" by the second proviso to Section 8(b)(7)(C) of the Act, 29 U.S.C. 158(b)(7)(C), which permits "any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization").

646, 649 (1995), enforced in relevant part, 95 F.3d 733 (8th Cir. 1996)). To determine "the nature and extent of [petitioner's] property interest" in the parking lot and the walkway in front of the supermarket, the Board "look[ed] to the law of the State of California, the state where [petitioner's] store is located." *Id.* at C11.

The Board concluded that, under California law, petitioner "did not have a right to exclude the union agents from the walkway in front of its store and from its parking lot," and that petitioner "would not have possessed such a right even if it had possessed complete ownership of the walkway and parking lot." Pet. App. C12. See also note 1, *supra*; note 9, *infra*. The Board explained that, in *Robins* v. *PruneYard Shopping Center*, 592 P.2d 341 (Cal. 1979), aff'd, 447 U.S. 74 (1980), "the California Supreme Court concluded that a shopping center's property right was limited by the free speech and petition sections of the California constitution." Pet. App. C11. The Board further observed that the California Supreme Court has held that "[t]he sidewalk outside a retail store has become the traditional and accepted place where unions may, by peaceful picketing, present to the public their views respecting a labor dispute with that store," and, "[i]n such context the location of the store whether it is on the main street of the downtown section . . . in a suburban shopping center or in a parking lot, does not make any difference." *Id.* at C12-C13 (quoting *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 599 P.2d 676, 687 (Cal. 1979)). The Board rejected petitioner's contention that it fell within an exception, recognized by the California Supreme Court for "modest retail establishment[s]." *Id.* at C12. Rather, the Board found the present case analogous to *In re Lane*, 457 P.2d 561 (Cal. 1969), where the

California Supreme Court permitted handbilling by a union official on a privately owned sidewalk outside an entrance to a free-standing supermarket roughly the same size as petitioner. Pet. App. C11-C12; see also *id.* at C18 n.15. The Board further concluded that, because "the union agents engaging in Section 7 activities on [the] walkway and parking lot did not interfere with any property right of [petitioner] * * * [t]he law concerning conflicts between Section 7 rights and property rights," as articulated in *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992), was not implicated in this case. Pet. App. C12.[3]

As a remedy, the Board ordered petitioner to cease and desist, *inter alia*, from "[t]hreatening to have representatives of [the Union] arrested if they do not cease picketing and distributing union-related literature on [petitioner's] premises," provided that the Union's activity "is conducted by a reasonable number of persons and does not unduly interfere with the normal use of facilities or operation of businesses not associated with [petitioner's] store." Pet. App. C14-C15.

3. The court of appeals enforced the Board's order. Pet. App. B1-B28. The court agreed with the Board that, apart from the location of the activity, the Union representatives' picketing and handbilling was pro-

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[3] In *Lechmere*, this Court reaffirmed the general rule of *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). As the Court explained in *Lechmere*, when the exercise of Section 7 rights by nonemployee union representatives conflicts with private property rights, "an employer may validly post his property against nonemployee distribution of union literature," except where "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." See 502 U.S. at 531-538.

tected by the Act. *Id.* at B14-B15. The court also agreed that *Lechmere* was inapplicable to this case. *Id.* at B9-B13. It explained that *Lechmere* "did not speak to the situation where, as here, an employer's state law property right does not entitle it to exclude organizers." *Id.* at B12-B13. The court noted that the Supreme Court "has since clarified * * * that employers may exclude union organizers in deference to state common law, but not because [the] NLRA itself restricts access." *Id.* at B12 (citing *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 217 n.21 (1994)).[4]

Turning to the state-law question, the court of appeals agreed with the Board that, under California law, petitioner did not possess "an interest which entitle[s] [it] to exclude Union organizers from the property." Pet. App. B16. The court explained that "California courts have granted broad protections to the peaceful exercise of free speech rights over property owners' exclusive control of their property" once such property is opened to members of the shopping public. *Id.* at B17. Thus, in *PruneYard*, *supra*, "the California Supreme Court held that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." Pet. App. B17 (internal quotation marks omitted).

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[4] In *Thunder Basin*, this Court explained: "The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it. To the contrary, this Court consistently has maintained that the NLRA may entitle union employees to obtain access to an employer's property under limited circumstances." 510 U.S. at 217 n.21. See also note 3, *supra*.

The court of appeals further observed that "the California courts have recognized that speech is protected not only in 'shopping malls' but also on the privately-owned sidewalk of a stand-alone grocery store," Pet. App. B17 (citing *In re Lane*, *supra*), and that the California Supreme Court has "approved the broader principle that 'the location of the store whether it is on the main street of the downtown section of the metropolitan area, in a suburban shopping center or in a parking lot, does not make any difference.'" *Ibid.* (quoting *Sears, Roebuck & Co.*, 599 P.2d at 687). The court of appeals therefore concluded that "California law prohibits owners of shopping malls and general access supermarket stores from excluding speech activity on their private adjacent sidewalks and parking lots." *Id.* at B18.

The court of appeals, like the Board, rejected petitioner's contention that it fell within an exception, recognized in the California Supreme Court's *Prune-Yard* decision, for "modest retail establishments." Pet. App. B18-B21. The court explained that the California intermediate appellate courts, applying that exception, "have distinguished supermarket-type stores, which invite the public at large to shop and congregate," from medical clinics and banks, "which do not invite the general public or have other attributes of a public forum." *Id.* at B20-B21. The court of appeals concluded that, under California law, "[w]hatever 'modest retail establishment' means, it does not include . . . a 'large 'supermarket-type' grocery store,'" such as petitioner. *Id.* at B21 (quoting *Bank of Stockton* v. *Church of Soldiers of the Cross of Christ*, 52 Cal. Rptr. 2d 429, 434 (Cal. Ct. App. 1996)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. The decision, moreover, rests primarily on an interpretation of California—not federal—law. Further review is therefore not warranted.

1. Petitioner concedes (Pet. 1) that "the Board and the Ninth Circuit correctly applied this Court's holding in *Lechmere*" to conclude that California law "controlled the issue of whether the non-employee union members could gain access to the property." However, petitioner asserts (Pet. 6-7) that review is necessary in this case because, in addressing that question of state law, "the Ninth Circuit failed to consider a factually similar California Court of Appeal case," *Trader Joe's Co.* v. *Progressive Campaigns, Inc.*, 73 Cal. App. 4th 425 (1999), which was issued after oral argument but before the Ninth Circuit decided this case. Petitioner contends that, by failing to address that decision expressly, the Ninth Circuit contravened the principle, set forth in *Stoner* v. *New York Life Insurance Co.*, 311 U.S. 464, 467 (1940), that federal courts are "to follow the decisions of intermediate courts of th[e] state 'in the absence of convincing evidence that the highest court of the state would decide differently.'" Pet. 7.

That contention lacks merit. The Ninth Circuit was fully cognizant of its obligation to follow relevant decisions of California's appellate courts addressing the state-law question posed by this case. See Pet. App. B16, B18 n.5. Indeed, the court's opinion extensively cites and discusses relevant California appellate decisions. See *id.* at B16-B22. And while the Ninth Circuit's opinion does not address the California Court

of Appeal's decision in *Trader Joe's*, that omission was the result of petitioner's failure to bring the *Trader Joe's* decision to the Ninth Circuit's attention in a timely fashion. *Trader Joe's*, in any event, does not undermine the correctness of the Ninth Circuit's construction of California law.

a. As petitioner acknowledges (Pet. 5-6), *Trader Joe's* was decided on July 8, 1999, approximately two months after oral argument in this case, but about one month *before* the Ninth Circuit rendered its decision. See also Pet. App. B1. Even though petitioner had adequate means for bringing that decision to the Ninth Circuit's attention, see, *e.g.*, Fed. R. App. P. 28(j), petitioner did not do so. Instead, as petitioner concedes (Pet. 2, 6), it waited until the Ninth Circuit issued its opinion, and then in its petition for rehearing raised *Trader Joe's* for the first time. See Pet. App. A1. It is well established that the courts of appeals are not obligated to address matters raised for the first time on rehearing, where those matters could have been raised earlier. See *United States* v. *Sutherland*, 428 F.2d 1152, 1158 (5th Cir. 1970) (Only "extraordinary circumstances * * * would justify our considering on petition for rehearing, issues which were not previously presented."). This Court, moreover, rarely reviews matters that, like petitioner's contentions based on the *Trader Joe's* decision, were not properly raised before, and were not passed upon by, the court of appeals. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992).

b. Besides, contrary to petitioner's assertions (Pet. 12), *Trader Joe's* does not accord petitioner "a state law property right to exclude the union handbillers." *Trader Joe's* merely held that, under the balancing test established by the California Supreme Court in *Prune-*

Yard, the owner of a free-standing retail store (*i.e.*, a store not part of a shopping center) was, in the circumstances of that case, privileged to deny access to individuals who wished to solicit signatures for voter initiative petitions. 73 Cal. App. 4th at 432-434. In reaching that conclusion, the court made it abundantly clear that "picketing by a labor union" would present a different case from the one before it because, under decisions of the California Supreme Court, such union activity may "justif[y] the impingement on private property rights." *Id.* at 435 (citing *In re Lane*, 457 P.2d 561 (Cal. 1969), and *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 599 P.2d 676 (Cal. 1979)). Accordingly, there is no reason to believe that the *Trader Joe's* court would have disagreed with the court of appeals' conclusion in this case. And, given the fact that *Trader Joe's* expressly distinguishes union handbilling and picketing cases like this one, the court of appeals certainly did not abuse its discretion by declining to address that case explicitly after petitioner raised it for the first time on rehearing.

Petitioner also cites (Pet. 14 n.4) a number of other California appellate decisions that were resolved in favor of the property owner and against persons seeking access. To the extent petitioner cites those cases in an effort to show that the court of appeals' interpretation of *Robins* v. *PruneYard Shopping Center*, 592 P.2d 341 (Cal. 1979), aff'd, 447 U.S. 74 (1980), was erroneous, petitioner merely seeks review of the court of appeals' construction of state law. This Court rarely (if ever) grants certiorari to review questions of state law. Petitioner, moreover, never distinguishes *Lane*, 457 P.2d at 561, a California Supreme Court decision addressing union activity that—like the activity in this case—occurred in the privately owned area sur-

rounding a free-standing store. Nor does it cite any case of that court, or of the California Court of Appeal, that permits a large, free-standing supermarket to prevent peaceful union picketing and handbilling in the parking lot or on walkways opened to use by members of the shopping public. Indeed, as the Ninth Circuit correctly observed here (Pet. App. B21), in one of the decisions cited by petitioner, the California Court of Appeal indicated that a "large 'supermarket-type' grocery store," such as petitioner, does *not* fall within the class of "modest retail establishment[s]" that the state supreme court's decision in *PruneYard* exempts from the right of access. See *Bank of Stockton* v. *Church of Soldiers of the Cross of Christ*, 52 Cal. Rptr. 2d 429, 434 (Cal. Ct. App. 1996). Although petitioner contends (Pet. 13 n.3) that *Bank of Stockton* "has little or no precedential value," the court below properly looked to that decision for guidance as to how the California courts would resolve the state-law question posed by the instant case.[5]

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[5] Petitioner argues (Pet. 13 n.3) that the *Bank of Stockton* court's statement was "mere dictum" and thus should have been accorded little weight by the Ninth Circuit. But the statement constituted an important part of the state court's reasoning, *i.e.*, of its *ratio decidendi*. The question in *Bank of Stockton* was whether the bank in that case fell within the "modest retail establishment" exception. To make that determination, the court was called upon to define what does, and does not, constitute such an establishment. Summarizing the holdings of the California courts, the court concluded that, "[w]hatever 'modest retail establishment' means, it does not include . . . a large supermarket-type grocery store." 52 Cal. Rptr. 2d at 434 (internal quotation marks omitted). The court further concluded, however, that the bank was not akin to such a grocery store, but rather was "comparable to the modest retail establishments" in other California decisions. *Ibid.*

Petitioner's reliance (Pet. 14-15) on decisions from other jurisdictions in support of its construction of California law is likewise misplaced. The court of appeals was not obligated to follow those decisions to the extent they are contrary to the decisions of the California courts. Moreover, the out-of-state authority cited by petitioner is inapposite. None of the cases addresses whether (much less holds that) an employer is privileged to exclude peaceful labor picketers and handbillers from the property immediately surrounding a large, free-standing retail supermarket.

2. Petitioner next contends (Pet. 17-21) that California law, by recognizing a right of access to the private property surrounding a free-standing retail store, effects a "taking" of property without just compensation, in violation of the Fifth Amendment. That contention, however, is not properly before this Court and, in any event, lacks merit.

a. As an initial matter, petitioner is jurisdictionally barred from raising its claim in this Court, because petitioner did not raise it before the Board. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner has alleged no "extraordinary circumstances" excusing its failure to raise its claim before the Board. Accordingly, petitioner is jurisdictionally barred from raising the claim in this Court. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3. (1975).

In addition, petitioner did not timely raise its taking argument in the court of appeals, and that court did not

address the claim. This Court ordinarily will not address a contention that has not been properly presented to or addressed by the court of appeals in the first instance. See, *e.g.*, *Youakim*, 425 U.S. at 234; *Yee*, 503 U.S. at 533.[6]

b. California law does not in any event effect a taking of petitioner's property. According to petitioner, permitting the Union's representatives to "physically occupy" the property belonging to a free-standing retail store is a per se taking. Pet. 18. That contention cannot be squared with this Court's decision in *PruneYard*, which rejected the argument that the physical presence of third parties on property is "determinative" of the takings question. 447 U.S. at 83-84. Rather, the Court explained that there is no "unconstitutional infringement of * * * property rights under the Takings Clause" in circumstances where, as here, nothing suggests that permitting the activities in question (on property that the owner has otherwise made "open to the public at large") "will unreasonably impair the value or use of th[e] property," the owner may "adopt[] time, place, and manner regulations that will minimize any interference with its commercial functions," and the individuals who come onto the property conduct them-

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[6] In its petition for rehearing, petitioner suggested that California law would effect an unconstitutional taking of property if it were construed to recognize a right of access to property other than the type of large shopping center involved in this Court's decision in *PruneYard* (citing *PruneYard*, 447 U.S. at 96-97 (Powell, J., concurring)). Because that claim was not timely raised, the court of appeals was not obligated to address it; the court of appeals thus properly denied the petition for rehearing without comment.

selves in an "orderly" fashion. *Ibid.*[7] The other decisions of this Court cited by petitioner (Pet. 19-20) likewise do not support its contention that a physical taking of property occurred here.[8]

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[7] To the extent petitioner relies (see Pet. 13-14, 21) on Justice Powell's concurring opinion in *PruneYard*, that reliance too is misplaced. Justice Powell (together with Justice White) joined the bulk of the Court's opinion "on the understanding that [the] decision is limited to the type of shopping center involved in this case. Significantly different questions would be presented if a State authorized strangers to picket or distribute leaflets in privately owned, freestanding stores and commercial premises." 447 U.S. at 96. Justice Powell did not indicate, however, how a takings claim in that different context should be resolved, see *id.* at 96-101 (Powell, J., concurring), and nowhere indicated that a State in fact would violate the Takings Clause if it were to grant a right of access to union representatives who wished to picket and handbill peacefully on the privately owned walkway and parking area surrounding a large, free-standing retail supermarket, in support of a labor dispute with the supermarket's operator.

[8] *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 832 (1987), cited at Pet. 19, involved "a classic right-of-way easement." This Court held that "a 'permanent physical occupation'" of property, for purposes of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." 483 U.S. at 831-832. The *Nollan* court concluded that its decision was "not inconsistent" with *PruneYard*, "since there the owner had already opened his property to the general public, and in addition permanent access was not required." *Id.* at 832 n.1. The same is true here. The Ninth Circuit's decision does not grant third parties "permanent access" to petitioner's premises and, as the court of appeals found, petitioner has extended a "broad" invitation to the general public "for the purpose of browsing and shopping." Pet. App. B21. In *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), cited at Pet. 20, the Court drew a similar distinction between the case before it and *PruneYard*. See *id.* at 394

Petitioner's suggestion (Pet. 21) that California law may effect a "regulatory" taking (rather than a physical occupation) under *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), is likewise misplaced. In *Del Monte Dunes*, the Court concluded that the "rough-proportionality" test of *Dolan* v. *City* of *Tigard*, 512 U.S. 374 (1994), which "considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts," was "not designed to address, and is not readily applicable to, the much different questions arising where * * * the landowner's challenge is based not on excessive exactions but on denial of development." 526 U.S. at 703. The instant case, of course, does not involve a denial of the right to develop property.[9]

(noting that, unlike in *PruneYard*, the recreational easement at issue in *Dolan* would have deprived the property owner of "all rights to regulate the time in which the public entered onto the greenway," regardless of the interference that access might have posed to the property).

[9] Even if one were to assume that permitting peaceful union expression on property opened to the shopping public would effect a taking, it is far from clear that petitioner would have standing to raise that claim, since petitioner has not shown that its *own* property rights were taken or affected. Petitioner's sublease—its lease with the lessee of the property's owner—gave it the right to operate the supermarket, but the sublease did not expressly give petitioner the right to exclude third parties at the time of the events underlying this case. See Pet. App. C15 n.1, C16 n.11. See also note 1, *supra*. It was only after the events at issue in this case that petitioner's sublease was amended to give it that right expressly. See *id.* at C15 n.1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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GARY E. CALKINS and ANNA ROSA CALKINS
d/b/a INDIO GROCERY OUTLET,
Petitioners,
VS.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

INTRODUCTORY STATEMENT

Petitioners Gary E. and Anna Rosa Calkins dba Indio Grocery Outlet ("Petitioners") hereby file their reply brief in support of their Petition for Writ of Certiorari ("Petition") filed with this Court on February 14, 2000. The Petition was placed on the docket on February 26, 2000, and seeks review of the decision of the United States Court of Appeal for the Ninth Circuit, which affirmed a decision of the National Labor Relations Board ("the Board") allowing handbilling and picketing by non-employees on behalf of a union on the private property of a free-standing grocery store operated by Petitioners and located in Indio, California.

The Petition argues that the Ninth Circuit wrongly construed California law as allowing the handbilling and picketing at issue. The Petition argues that the Ninth Circuit, in ruling on the case, disregarded established California precedent by failing to consider a recent California Court of Appeal ruling, *Trader Joe's v. Progressive Campaigns, Inc.*, 73 Cal.App.4th 425 (1999), issued after briefing and oral argument to the Ninth Circuit were complete but before the decision was issued. *Trader Joe's* held that California's access rights for petition signature gathering do not extend to a free-standing grocery store. *Id.* at 433. Despite Petitioners' calling the Ninth Circuit's attention to the *Trader Joe's* case by way of a petition for reconsideration ("Reconsideration Petition"), the Ninth Circuit denied the Reconsideration Petition without comment. Petitioners requested the Ninth Circuit, in the Reconsideration Petition, to certify the question at issue to the California Supreme Court, through rules established for that purpose in 1998. Petitioners requested this court to certify the issue to the California Supreme Court in the Petition.

Petitioners made the request because of (1) the age and questionable value of the precedents relied on by the Board and the Ninth Circuit in reaching their conclusions, and (2) because all the California Court of Appeal decisions since *Robins* have refused to extend it beyond regional shopping centers. Both petitions cited to a case, *Los Angeles Alliance for Survival v. City of Los Angeles,* 157 F.3d 1162 (1999) (hereinafter *"Alliance for Survival I"*), wherein the Ninth Circuit had certified another issue to the California Supreme Court involving the scope of California's state constitutional free speech protections.[1]

After the filing of the Petition, the California Supreme Court issued its decision in *Los Angeles Alliance for Survival v. City of Los Angeles,* 22 Cal.4th 352; 93 Cal.Rptr.2d 1 (2000) on March 2, 2000 (hereinafter *"Alliance for Survival II"*). In that case, the California Supreme Court adopted a more restrictive view of Article I, Section 2 than was adopted by the Ninth Circuit (although in *Alliance for Survival* the provision was discussed in the context of a law criminalizing "aggressive solicitation"). Before ruling on the merits of the certified question, the California Supreme Court extolled the benefits of the certification procedure. Respondent's arguments exaggerate the strength of the precedents that predate *Robins v. PruneYard Shopping Center,* 23 Cal.3d 899 (1979), while attempting to minimize the holdings and analysis of more recent cases, which show that California's courts have limited *Robins* to large shopping centers. The two main cases relied upon by the Ninth Circuit below, *In re Lane,* 71 Cal.2d 872 (1969), and *Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers' Union,* 61 Cal.2d 766 (1964), do not

[1] Article 1, Section 2 of the California Constitution states in part: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

follow the balancing test enunciated in *Robins,* which was decided long after those cases. Recent cases involving access issues have severely limited those pre-Robins cases. The Court should grant the Petition.

II.

THE COURT SHOULD GRANT THE WRIT AND CERTIFY THE ISSUE TO THE CALIFORNIA SUPREME COURT

California Rule of Court Rule 29.5, adopted in 1998, allows the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory or commonwealth, to certify potentially determinative questions of California law to the California Supreme Court.

In its first opinion based on a certified question, in *Alliance For Survival II, supra,* the California Supreme Court identified several benefits of the procedure. The Court stated that certification: "(i) allows federal courts to avoid mischaracterizing state law (thereby avoiding a misstatement that might produce an injustice in the particular case and potentially mislead other federal and state courts until the state supreme court finally, in other litigation, corrects the error); (ii) strengthens the primacy of the state supreme court in interpreting state law by giving it the first opportunity to conclusively decide an issue; (iii) avoids conflicts between federal and state courts, and forestalls needless litigation; and (iv) protects the sovereignty of state courts." *Alliance for Survival II,* 22 Cal.4th 352, 360-361; 93 Cal.Rptr.1, 5 (2000) (citations omitted).

The California Supreme Court also stated that allowing federal courts to rule regarding state law issues creates a perverse incentive. If the Ninth Circuit has ruled favorably on the interpretation of a particular aspect of California law,

the party favoring that ruling has incentive to file litigation in federal court (by joining a state law claim with a federal constitutional claim), because the California Court of Appeal is not bound by the interpretation of California law as predicted or inferred by a federal court. However, federal district courts are bound by a decision of the Ninth Circuit. In a situation such as this, the certification procedure "provides that most expeditious, and, as a practical matter, perhaps the only effective, means to enable California, through the courts, to exercise the state's authority over the proper interpretation and application of article I, section 2(a) of its own Constitution." *Id.* at 361, 93 Cal.Rptr. at 6.

This Court has also repeatedly endorsed certification as an important part of federalism. "Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.' " *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S.Ct. 1055, 1073 (1997) (quoting *Lehman Brothers v. Schein,* 416 U.S. 386, 391, 94 S.Ct. 1741, 1744 (1974)).

In ruling on requests for certification by parties, courts of appeal have looked at several factors, including whether the question at issue is dispositive of the case (clearly applicable here), and whether the state law in question is unclear or in conflict on the subject. See *Alliance for Survival I, supra,* 157 F.3d 1162, 1165 (noting that certification of issue is proper because California Court of Appeal cases present conflicting views). Here, as discussed below, the older cases relied on by the Ninth Circuit are questionable precedent and conflict with all of the more recent cases involving properties which are not large shopping centers, in which courts have found no right of access. Therefore, certification is proper. Other arguments against certification which are

routinely presented (delay, crowding of court dockets, etc.) are similarly without merit. *See* Braun, *A Certification Rule for California,* 36 Santa Clara L.Rev. 935, 942-945 (1996); Schneider, *"But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law,"* 41 Wayne L.Rev. 273, 294-298 (1995).

The case for certification is especially strong here, for the reasons discussed above, and because the large body of law regarding access cases in California shows that these access cases recur frequently.

California Courts of Appeal have in fact rejected access claims to private property near grocery stores (*Trader Joe's, supra*), banks (*Bank of Stockton v. Church of Soldiers,* 44 Cal.App.4th 1623, 1628-1629; 42 Cal.Rptr.2d 429 (1996), apartment buildings (*Golden Gateway Center v. Golden Gateway Tenants Association,* 87 Cal.Rptr.2d 22 (*review granted* November 23, 1999) and medical clinics (*Feminist Women's Health Center v. Blythe,* 32 Cal.App.4th 1641, 1660-1661 (1995), and cases cited therein). In *Judlo, Inc. v. The Vons Cos., 211 Cal.App.3d 1020;* 259 Cal.Rptr. 624 (1989), the Court of Appeal reversed a trial court's injunction requiring a grocery store owner to allow placement of newsracks on private property outside the store. The Court of Appeal agreed with Vons that its grocery store, unlike the shopping center in *Robins,* was not "the functional equivalent of a municipality" and therefore did not have to provide such access. *Id.* at 1027-1028.

Trader Joe's strongly rejected the dicta in *Bank of Stockton* which stated that *Robins* applied to large, supermarket-type grocery stores, in holding that an 11,000 square foot grocery store was not available as a public forum under *Robins,* and that the size of the store in question was not a determinative factor, and that the analysis should properly focus on the degree to which the particular property is open

to the public and the societal interest in having that forum for expressive activity.

California trial courts have also repeatedly ruled that property outside of stand-alone grocery stores, regardless of size, are not subject to access.[2] Cases outside of California, in states that have adopted *Robins* to at least some extent have also limited access rights to large shopping centers, while rejecting claims of access to free-standing stores.[3]

The cases relied on by the Ninth Circuit are between twenty-one and thirty-six years old, and are of questionable value as precedent. The first decision relied on by the Ninth Circuit, *Lane, supra,* was decided when federal law guaran-

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[2] *Busch v. Ralphs,* Los Angeles County Superior Court Case No. SC 051874 (summary judgment granted April 9, 1999, in favor of grocery store owner against persons soliciting petition signatures), *Waremart, Inc. v. Discovery Petition Management,* Butte County Superior Court Case No. 121900 (summary judgment granted September 15, 1999, for retailer of groceries and related items against persons soliciting petition signatures), *Young v. Raley's, Inc.,* Yolo County Superior Court Case No. V97-00076 (judgment after trial in favor of stand-alone grocery store owner against petition signature gatherers on or about May 11, 1999). Counsel for petitioners in this matter also represents Ralphs in the pending appeal of that matter. It is unknown whether either of the other cases cited in this footnote have been appealed.

[3] *Waremart v. Progressive Campaigns, Inc.,* 139 Wash.2d 623, 989 P.2d 524, 530 (1999), (No access to solicit signatures outside of 80,000-square foot grocery store located in a strip mall because store is not the "equivalent of a 'town square,' 'community business block,' or other public forum."); *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.,* 138 N.J. 326, 373 (1994) ("No highway, no strip mall, no football stadium, no theater, no single huge suburban store, no stand-alone use, and no small to medium shopping center sufficiently . . . warrant[s] the constitutional extension of free speech to those premises, and we so hold."); *Wabban, Inc. v. Brookhart,* 142 Ore.App. 261 (1996) (no right of access for leafletters at two large stand-alone Home Base stores; court held that Home Base parking lots were not equivalent of town square).

teed access to shopping centers under the First Amendment, and predates by ten years the California Supreme Court's decision in *Robins, supra,* wherein the Supreme Court created a right of access to certain enclosed shopping centers under the California Constitution and created the balancing test applied by the Court of Appeal in *Trader Joe's. Trader Joe's* states that "[t]he [*Robins v.*] Pruneyard court's reference to *Lane* was brief and collateral; the court did not expressly or implicitly hold that our state constitution protects free speech and petitioning rights at privately owned stand-alone grocery stores. Indeed, as already noted, no published decision in this state contains such a holding." *Trader Joe's, supra,* at 436, 86 Cal.Rptr.2d at 450. The Attorney General of the State of California, in a 1990 opinion regarding access rights to parking lots of abortion clinics, rejected the idea that the *Robins* court had endorsed the holding in *Lane.* "It is not clear what the *Robins* court meant when it said that the usefulness of *Lane* as precedent was not diminished by the overruling of the *Logan Valley* case. It might be argued that it suggests that the rights announced in *Lane* would survive in California as part of the [California constitutional freedom of speech]. *We reject this argument because it flies in the face of the express language in the Robins opinion that it does not apply to "the proprietor of a modest retail establishment."* 73 Ops.Atty.Gen. 213, 217-218 (1990) (emphasis added).

Schwartz-Torrance, supra, predates *Robins* by fifteen years, was decided when federal law allowed access to shopping centers, and is bereft of any discussion of a balancing test such as was applied by the Court in *Robins.* In *Union of Needletrades, Industrial & Textile Employees, AFL-CIO v. Superior Court (Taubman Co.),* 56 Cal.App.4th 996, 65 Cal.Rptr.2d 838 (1997) (hereinafter *"UNITE"*), the Court of Appeal stated that "*Schwartz* is of dubious value for the proposition cited given that it predates *[Robins v.] Pruneyard* (sic) by 15 years and *Pruneyard*

(sic) is the linchpin of the claim that there is a state constitutional right." The Court of Appeal also rejected the argument by UNITE that citations of *Schwartz* by the *Robins* court represented an endorsement of the holding in *Schwartz:* "Those citations were simply for the proposition that the property rights of the shopping centers were not absolute but were subject to a balancing process in determining the right to access." *UNITE, supra,* at 1012.

In *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,* 25 Cal.3d 317 (1979), another case relied on by the Board and the Ninth Circuit, the California Supreme Court expressly stated that it was deciding the case on statutory grounds and that it "express[ed] no opinion on whether the California Constitution protects the picketing here at issue." *Id.* at 327, fn. 5. Therefore, that case cannot be used as precedent.

III.

THE COURT SHOULD GRANT THE PETITION EVEN IF IT DOES NOT CERTIFY THE QUESTION TO THE CALIFORNIA SUPREME COURT

Even if the Court does not grant the Petition and certify the question of whether California law grants non-employees rights to picket and handbill at a free-standing grocery store, the Court should nevertheless grant the Petition and reverse the decision of the Ninth Circuit with regard to California law on this issue, because the more recent cases decided by state courts limiting access rights outside the context of large shopping malls are more persuasive than the older cases, which are inconsistent with the analytical framework of *Robins.* Because these arguments are addressed in Section II above, they will not be restated here.

Respondent argues that this Court need not consider *Trader Joe's* because it was not raised prior to the Reconsid-

eration Petition. Respondent concedes that *Trader Joe's* was decided well after completion of briefing and oral argument, and approximately one month before issuance of the decision by the Ninth Circuit. Nevertheless, Respondent argues that Petitioners should not be able to argue that *Trader Joe's* should be considered, because Petitioners had an approximate one month window to raise *Trader Joe's* to the Ninth Circuit by supplemental brief. However, the authorities cited by Respondent are inapposite. In *United States v. Sutherland,* 428 F.2d 1152, 1158 (5th Cir. 1970), the court held that a party could not present a different theory on a motion for reconsideration than was presented on appeal, where the legal basis for the new *theory* (a federal statute passed in 1968) existed before the appeal was decided in April 1970. Here, the petition for reconsideration did not present a different legal theory, but rather pointed to a new decision in support of an existing theory. Second, unlike the 1968 statute, *Trader Joe's* could not have been presented to the Ninth Circuit until about one month before the decision was issued (assuming counsel for Petitioners had instantaneous knowledge of the *Trader Joe's* opinion and the ability to instantly draft a supplemental brief on the issues raised by the opinion).

With regard to Respondent's contention that the Ninth Circuit has not passed on the applicability of *Trader Joe's,* the denial of the petition for reconsideration certainly qualifies as passing on that claim, absent some statement from the Ninth Circuit that it did not consider the merits of the Reconsideration Petition due to some procedural defect.

Respondent's contention that Petitioners seek review of a pure state law issue is misleading. This Court has repeatedly held that a conflict between the decision of a federal court of appeal and either the state's highest court or state intermediate courts of appeal is an appropriate basis for review. See *Six Companies v. Highway District,* 311 U.S. 180 (1940);

West v. American T & T Co., 311 U.S. 223 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940).

Contrary to Respondent's arguments concerning the validity of the precedent established in *In re Lane*, Petitioners clearly distinguished *Lane* both in this reply brief and in the original petition. Petitioners have also clearly established that the references to the holding in *Lane* by the Court of Appeal in *Bank of Stockton* was dicta. Respondent's argument (Respondent's Brief, page 12, fn. 5) that the Court of Appeal necessarily had to conclude that the Bank was not a grocery store in order to determine that the bank qualified as a "modest retail establishment" under *Robins* flies in the face of logic. Further, as discussed above, the argument that *Robins* stands for the proposition that there is no access to "modest retail establishments" and allows access to larger retail establishments is a red herring. The balancing test enunciated in *Robins* and discussed at length in *Trader Joe's* is used to balance competing rights, a more complex analysis than merely labeling a particular establishment as being "modest" or not.

IV.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 10, 2000 Respectfully submitted,

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